Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Petitioner,

v.

JUSTINE LAI and ELVIRA VIERNES,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Civil Rights Act of 1991 requires a court before compelling arbitration to make a special preliminary finding that there was a "knowing agreement" to arbitrate federal and state statutory employment discrimination claims that otherwise would be arbitrable under the Federal Arbitration Act in accordance with this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), thereby imposing judicial burdens on the arbitration process inconsistent with this Court's recent decision in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 115 S. Ct. 834 (1995).

2. Whether the Civil Rights Act of 1991 requires a judicial resolution of *state-law* claims (absent a "knowing agreement" to arbitrate such claims) which a state otherwise deems appropriate for arbitral resolution in the absence of such agreement.

STATEMENT REQUIRED BY RULE 29.1

The names of all parties in the court below appear in the caption of the case. The Prudential Insurance Company of America ("Prudential" or "Petitioner") has no parent company. In addition to wholly owned subsidiaries, Prudential has the following subsidiaries: PREMISYS Real Estate Services, Inc. of Colorado; OTIP/RAEO Insurance Company, Inc.; Prudential of America Life Insurance Company (Canada); Lapine Holding Company; Lapine Technology Corporation; Prudential Asia DBS Limited; PAMA (Indonesia) Limited; PT PAMA Indonesia; Simmons Co. Limited; Simmons Bedding and Furniture (Hong Kong) Ltd.; Simmons Asia Limited; Simmons (Southeast Asia) Private Limited; and Rush Prudential Health Plans.

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 42 F.3d 1299 (9th Cir. 1994), and is reproduced in the Appendix to this Petition. App. 1-15. The opinion of the district court is unreported and is reproduced in the Appendix. App. 18-22.

JURISDICTION

The judgment of the Court of Appeals was entered December 20, 1994. Petitioner filed a timely Petition for

Rehearing with Suggestion for Rehearing En Banc on January 9, 1995, after the time for filing was extended by the Court of Appeals. The Petition was denied in an Order dated February 21, 1995, which is reproduced in the Appendix. App. 16. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The following provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* and the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended, are pertinent to this case:

9 U.S.C. § 2:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an

agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C.§ 4:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof . . . .

Pub. L. 102-166, § 118, 105 Stat. 1071, 1081 (1991) (codified as an historical and statutory note to 42 U.S.C. § 1981 (Supp. 1994)):

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

STATEMENT OF THE CASE

Justine Lai and Elvira Viernes (hereinafter "plaintiffs") sued Prudential in the Superior Court of California for the County of Los Angeles for various common-law torts and for employment discrimination in violation of the California Fair Employment and Housing Act. Cal. Gov't Code § 12940(h). App. 18, 22. Plaintiffs did not sue Prudential for employment discrimination in violation of any federal statute. Prudential subsequently filed a Petition to Compel Arbitration and Stay State Court Proceedings with the United States District Court for the Central District of California. The district court's jurisdiction was invoked pursuant to 28 U.S.C. § 1332. App. 18. The district court did not hold an evidentiary hearing and made no factual findings. App. 18-19. To the extent any factual findings were made, they were made by the Court of Appeals. 42 F.3d at 1306 (Norris, J., concurring).[1]

Plaintiffs worked for Prudential as sales agents. They sold insurance policies and other products deemed to be securities under state and federal law. To engage in that activity, each plaintiff was required to be registered with the National Association of Securities Dealers ("NASD"). To register with the NASD, each plaintiff signed a "Uniform Application For Securities Industry Registration Or Transfer" (hereinafter "Form U-4"). The Form U-4 included an agreement "to arbitrate any dispute, claim or

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[1] Judge Norris was critical of the majority's engagement in appellate fact-finding, noting that "[t]he question of a knowing waiver of rights is so highly fact-sensitive that it should rarely, if ever, be decided in the first instance by an appellate court." 42 F.3d at 1306.

controversy" that may arise between plaintiffs and Prudential that is required to be arbitrated under the rules of the NASD. NASD rules require arbitration of any "dispute, claim or controversy . . . arising in connection with the business of [NASD] members." App. 6-7, 18-19.[2]

Plaintiffs do not dispute that they each signed a written agreement containing the referenced arbitration clause. The arbitration clause is set forth immediately below words in bold print that advise the applicant to read the language containing the arbitration clause "VERY CAREFULLY". App. 23-24. Plaintiffs signed the document just inches below the arbitration clause.

Plaintiffs claim that the arbitration agreement is unenforceable as to their statutory employment discrimination claims because they did not "knowingly" waive their right to a jury trial. App. 21. The district court rejected this argument, relying on "the well-established principle that arbitration agreements need not include an

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[2] Form U-4 is in general use throughout the securities industry. The Securities and Exchange Commission ("SEC"), as part of its regulatory mandate under the Securities Exchange Act of 1934, 15 U.S.C. § 78(a) *et seq.*, has the responsibility for overseeing and approving the rules of the NASD. This oversight extends to the administration of arbitration systems. *See* Order Approving Proposed Rule Changes by NYSE, NASD and AMEX Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses, Comm. Rel. No. 34-26805, 54 Fed. Reg. 21,144 & 21,145 n.7 (1989). The SEC agreed to include an arbitration agreement in the uniform form "[t]o accommodate the self-regulatory organizations that require arbitration and to obviate the need for applicants registering with those organizations to complete papers beyond Form U-4. . . . " *Association of Investment Brokers v. SEC*, 676 F.2d 857, 861 (D.C. Cir. 1982).

express waiver of a jury trial." App. 21. Moreover, contrary to plaintiffs' assertions, the district court did not find any legislative intent, either federal or state, to preclude or limit arbitration of employment discrimination claims. The district court granted Prudential's Motion to Compel Arbitration. App. 22.

The Ninth Circuit vacated the district court's order. The appellate court found a congressional intent to restrict arbitration of both federal and state statutory employment discrimination claims in the language of section 118 of the Civil Rights Act of 1991 (hereinafter "the 1991 Act")[3] and in one House of Representatives report and a fragment of Senator Dole's statement regarding section 118. To the Court of Appeals, the text of the amended statute and the referenced portions of its legislative history evidence a "congressional concern that Title VII disputes be arbitrated only 'where appropriate,' and only when such a procedure was knowingly accepted. . . ." 42 F.3d at 1305. As a result, the Ninth Circuit concluded that parties to arbitration agreements covered by the FAA are not required to submit either federal or state statutory claims of employment discrimination to arbitration absent a special judicial finding that they "knowingly agreed" to arbitrate these particular kinds of claims.[4] To

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[3] Section 118 reads, in pertinent part: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." *Pub. L.* 102-166, § 118, 105 Stat. 1071, 1081 (1991).

[4] The standard adopted by the appellate court resembles the "contemplation of the parties" standard recently rejected by this Court in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 115

justify its creation of this standard, the Ninth Circuit cited not only the text and legislative history of the 1991 Act, but also the attributes of a judicial proceeding, which the court presumed to be "particularly significant" and "especially important" for statutory employment discrimination claims. To the appellate court, the perceived deficiencies in the arbitral process would weaken the protections afforded in the underlying substantive law. 42 F.3d at 1305.

Applying the foregoing analytical framework, the Court of Appeals determined that the plaintiffs could not have understood that, by signing the Form U-4, they were agreeing to arbitrate their statutory employment discrimination claims. 42 F.3d at 1305. As a result, the appellate court released plaintiffs from their agreement to arbitrate their pending claims, vacated the order of the district court, and remanded the matter for the district court to dismiss Prudential's Petition to Compel Arbitration.

REASONS FOR GRANTING THE WRIT

This case presents the important and recurring question of the proper role of a court in a suit or motion to compel arbitration of statutory employment discrimination claims under the Federal Arbitration Act ("FAA"). Specifically, this case raises the question whether the Ninth Circuit correctly interpreted Title VII, as amended by the Civil Rights Act of 1991, to restrict the arbitration

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S. Ct. 834, 841-43 (1995). The Ninth Circuit lacked the benefit of this Court's reasoning in *Allied-Bruce Terminix* when it rendered its opinion.

of federal and state statutory employment discrimination claims that are otherwise arbitrable under the FAA and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). It also raises the question whether requiring a preliminary judicial finding that the parties "knowingly agreed" to arbitrate their statutory employment discrimination claims conflicts with this Court's recent opinion in *Allied-Bruce Terminix* by creating "a test that risks the very kind of costs and delay through litigation (about the circumstances of contract formation) that Congress wrote the [FAA] to help the parties avoid[.]" 115 S. Ct. at 841. Moreover, the Ninth Circuit's opinion also improperly interferes with state laws encouraging alternative dispute resolution. Specifically, the opinion impermissibly encroaches on California law which enforces agreements to arbitrate state statutory employment discrimination claims without requiring a "knowing" waiver.

These questions implicate two major federal policies: the national policy protecting victims of employment discrimination proscribed by Title VII and the national policy embodied in the FAA favoring the arbitration of disputes. The Ninth Circuit perceived a conflict between these two statutes and their respective policy objectives. However, these statutes and their policy objectives do not conflict. Contrary to the Ninth Circuit's view, Congress specifically recognized and endorsed the important convergence of these national policies in section 118 of the 1991 Act, which expressly provides that arbitration of statutory employment discrimination claims "is encouraged." In short, arbitration of the claims in this case is mandated by the FAA and decisions of this Court, is consistent with Title VII, and is encouraged by the 1991 Act.

I. The Ninth Circuit's Standard Reverses The Well-Established Presumption In Favor Of Arbitrability And Undermines Federal Policy Favoring Arbitration

Congress passed the FAA in 1925 "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer*, 500 U.S. at 24. The FAA expressed congressional recognition not only of the great value of arbitration but also of the costs imposed by judicial hostility toward arbitration. *See* S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924) ("The settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests as well as to individuals"); H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924) ("It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable"), *quoted in Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985). Thus, the FAA plainly expresses a strong federal policy favoring arbitration, abrogating historic hostility toward arbitration. "In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration . . . . " *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), *quoted in Perry v. Thomas*, 482 U.S. 483, 489 (1987).

A. The Ninth Circuit's "Knowing Agreement" Standard For Determining The Scope Of An Arbitration Agreement Conflicts With Decisions Of This Court And Other Courts Of Appeals

1. The "Knowing Agreement" Standard Contradicts The Presumption Favoring Arbitrability

" '[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration,' " with " 'any doubts concerning the scope of arbitrable issues [to] be resolved in favor of arbitration.' " *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (quoting *Moses H. Cone Memorial Hospital v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983)). This presumption in favor of arbitrability applies equally "where a party bound by an arbitration agreement raises claims founded on statutory rights." *Mitsubishi Motors*, 473 U.S. at 626. Thus, a court must not exclude a dispute from the coverage of an arbitration agreement "unless it may be said *with positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-83 (1960) (emphasis added). The presumption of arbitrability is especially powerful where, as here, the arbitration agreement has broad language: "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm . . . . " App. 6. *See AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986) ("[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the

claim from arbitration can prevail") (quoting *Warrior & Gulf*, 363 U.S. at 584-85).

Here, the Ninth Circuit *reversed* that presumption with regard to the interpretation of arbitration agreements when the dispute involves statutory claims of discrimination. The court's opinion implies that any agreement that fails, at a minimum, to specify "employment disputes" will not be read as encompassing statutory discrimination claims, even where such an interpretation is plausible. Thus, an agreement to arbitrate will no longer be read in the broadest manner to encompass the dispute, but rather will be construed narrowly, at least with respect to statutory discrimination claims, to *exclude* the dispute unless the plaintiff admits that she knew the dispute was covered by the agreement. The impact of the Ninth Circuit's decision is to narrow severely the broad federal policy favoring enforcement of arbitration agreements, thereby resurrecting an outmoded presumption disfavoring arbitration.

Other circuit courts addressing the issue of the scope of arbitrability in connection with a general arbitration agreement follow this Court's precedent, without requiring a "knowing agreement" to arbitrate particular claims.[5] Indeed, in other cases involving the same arbitration agreement as involved here – the standard agreement contained in Form U-4 – courts never applied a "knowing agreement" standard to the question of arbitrability of statutory employment discrimination claims or

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[5] *See, e.g., Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 48 (2d Cir. 1993); *Complaint of Hornbeck Offshore (1984) Corp. v. Coastal Carriers Corp.*, 981 F.2d 752, 754-55 (5th Cir. 1993); *Sharon Steel Corp. v. Jewell Coal & Coke*

any other statutory claims, consistently deferring these disputes to arbitration.[6]

2. The "Knowing Agreement" Standard Impermissibly Relies On Perceived Inadequacies Of Arbitration

This Court has cautioned repeatedly *against* viewing arbitration as weakening the protections afforded in the substantive law. *See, e.g., Mitsubishi Motors,* 473 U.S. at 626-27 ("we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution"); *Rodriguez De Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 481 (1989) ("suspicion of arbitration . . . has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes"); *Gilmer,* 500 U.S. at 30-32 (rejecting challenges to arbitration based on possible bias of arbitrators, inadequate discovery and absence of judicial review).

Contrary to this Court's teachings, the Ninth Circuit's opinion presumes that significant deficiencies

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Co., 735 F.2d 775, 778 (3d Cir. 1984); *Cincinnati Gas & Elec. Co. v. Benjamin F. Shaw Co.,* 706 F.2d 155, 159-60 (6th Cir. 1983); *Contracting Northwest, Inc. v. City of Fredericksburg, Iowa,* 713 F.2d 382, 386 (8th Cir. 1983).

[6] *See, e.g., Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 39 F.3d 1482 (10th Cir. 1994); *Kidd v. Equitable Life Assurance Society,* 32 F.3d 516 (11th Cir. 1994); *Alford v. Dean Witter Reynolds, Inc.,* 975 F.2d 1161 (5th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.,* 948 F.2d 305 (6th Cir. 1991).

inhere in the arbitral process. While recognizing that "the Supreme Court has pointed out that plaintiffs who arbitrate their statutory claims do not 'forego the substantive rights afforded by the statute,' " the Court of Appeals, nevertheless, concludes that statutory employment discrimination claims uniquely require the "procedural protections" associated with a judicial proceeding, and reasons that any waiver of these procedural rights must require a "knowing" agreement. 42 F.3d at 1305. The "knowing agreement" standard thus stems from an "anachronistic judicial hostility to agreements to arbitrate" that the FAA was designed to overcome. *Mitsubishi Motors*, 473 U.S. at 625 n.14.

B. The Ninth Circuit's Opinion Will Encourage Collateral Litigation, Contrary To The FAA

The Ninth Circuit's opinion ties the enforceability of an otherwise valid agreement to arbitrate statutory employment discrimination claims to an inquiry into the circumstances surrounding the execution of that agreement.[7] This unprecedented ruling promises to foster pre-arbitration collateral litigation, contrary to an important purpose of the FAA to limit litigation. The ruling, thereby, diminishes the value of arbitration by increasing the risk of two trials – a first trial in court to examine the parties'

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[7] *See* 42 F.3d at 1305 (citing *Gilmer* as an example of a case where plaintiff "knowingly agreed" to arbitration but noting that Gilmer was an "experienced businessman"); *see also id.* at 1306 (Norris, J., concurring) (criticizing majority getting involved in the "highly fact-sensitive" review associated with the question of a knowing waiver).

intent at the time of contract formation, followed by a second trial before the arbitrator to address the issues of statutory violation and damages. The Ninth Circuit's mandated inquiry into the circumstances surrounding the making of the arbitration agreement at issue stands in stark contrast to the "rapid and unobstructed enforcement of arbitration agreements" called for by this Court's decision in *Moses H. Cone Memorial Hosp.*, 460 U.S. at 23. *See also id.* at 22 (FAA requires "expeditious and summary hearing, with only restricted inquiry into factual issues").

Giving a party to an arbitration agreement the right to demand that a court inquire into the state of mind of the parties and other circumstances regarding the execution of the arbitration agreement will generate a waste of resources that is *precisely* what arbitration and its enforcement through the FAA are designed to avoid. This Court addressed this problem in *Allied-Bruce Terminix*. In rejecting the "contemplation of the parties" test for purposes of determining whether an arbitration agreement involves commerce so as to trigger application of the FAA, the Court asked rhetorically: "Why would Congress intend a test that risks the very kind of costs and delay through litigation (about the circumstances of contract formation) that Congress wrote the Act to help the parties avoid?" 115 S. Ct. at 841. As is true of the now rejected "contemplation of the parties" test, the Ninth Circuit's "knowing agreement" standard undermines the purpose of the FAA and fails to effectuate congressional intent regarding the scope of that Act by making application of the FAA more time-consuming, uncertain, and inconsistent.[8]

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[8] The new requirement of a fact-bound inquiry into the parties' intent at the time of contract formation will give

II. The Ninth Circuit's "Knowing Agreement" Standard Does Not Have Support In Title VII, As Amended By The Civil Rights Act Of 1991

The Ninth Circuit claimed to find support for its standard of a "knowing agreement" to arbitrate federal and state statutory discrimination claims in "the text and legislative history of Title VII," as amended by section 118 of the 1991 Act. 42 F.3d at 1304. An analysis of that claim, however, only fortifies the conclusion that the Ninth Circuit's opinion is badly out of step with the law as interpreted by this Court.

Congress is presumed to know existing law when it enacts new statutes. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). Thus, a newly enacted or amended statute is presumed to be harmonious with existing law *and its judicial construction*. *See Estate of Wood v. C.I.R.*, 909 F.2d 1155, 1160 (8th Cir. 1990). The state of arbitration law as it existed upon enactment of the 1991 Act was this Court's opinion in *Gilmer*. Nothing in the text or legislative history of the 1991 Act changes that law as it relates to the arbitration of a claim under Title VII. The Ninth Circuit's opinion is incompatible with *Gilmer*. It also is incompatible with the opinions of several other circuit courts on the question of the enforceability of the Form U-4 agreement to arbitrate as it relates to statutory employment discrimination disputes.

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virtually unreviewable discretion to those state and federal courts that remain hostile to arbitration.

A. The Ninth Circuit's Opinion Conflicts With Pre-1991 Act Law

Upon enactment of the 1991 Act, *Gilmer* was the state of arbitration law with respect to statutory employment discrimination claims. Under *Gilmer*, arbitration of statutory discrimination claims is appropriate and authorized by law because it does not take away the parties' substantive rights under the statute, but rather merely " 'submits to their resolution in an arbitral, rather than a judicial, forum.' " 500 U.S. at 26 (quoting *Mitsubishi Motors*, 473 U.S. at 628). Thus, the Court in *Gilmer* held that a person who sued his employer for age discrimination, after signing an industry agreement containing an arbitration clause (a Form U-4 similar in all material respects to the ones signed by plaintiffs), was required to proceed to arbitration pursuant to that agreement.

The *Gilmer* Court reached this conclusion by applying the principle that parties who have made a bargain to arbitrate " 'should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.' " 500 U.S. at 26 (quoting *Mitsubishi Motors*, 473 U.S. at 628). The Court then applied that principle to a federal age discrimination claim brought under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.* The Court found no "inherent inconsistency" between the federal policy favoring enforcement of arbitration agreements and the federal policy forbidding age discrimination in employment, *id.* at 27-28, even though (1) arbitration deprives litigants of a judicial forum provided for by ADEA, *id.* at 28-29, (2) arbitration lacks full-scale discovery and other judicial procedures, *id.* at 30-32, and

(3) arbitration agreements sometimes result from unequal bargaining, *id.* at 32-33.

The Ninth Circuit acknowledged the general standard stated in *Gilmer,* but failed in several significant respects to follow the *Gilmer* Court's specific application of that standard to statutory employment discrimination disputes. First, the Ninth Circuit denied enforcement of an otherwise valid arbitration agreement by relying on the "particularly significant" "procedural protections," 42 F.3d at 1305 & n.4, available to a plaintiff in a Title VII sexual harassment lawsuit. This approach is squarely at odds with the reasoning in *Gilmer,* which dismissed reliance on those very factors in the context of a lawsuit for age discrimination. *See* 500 U.S. at 27-33. Second, the Ninth Circuit posited a conflict between the policies of Title VII and the FAA by emphasizing that "our public policy of protecting victims of sexual discrimination and harassment through the provisions of Title VII and analogous state statutes . . . is at least as strong as our policy in favor of arbitration," 42 F.3d at 1305, as though the two policies are in conflict or competition. The Ninth Circuit thus posed a false conflict that the Court in *Gilmer* already had debunked when it established the lack of "any inherent inconsistency," 500 U.S. at 27, between policies favoring arbitration and those forbidding discrimination.

Most fundamentally, the Ninth Circuit strayed far from the teachings of *Gilmer* by constructing a standard for waiving procedural rights to a jury trial that should apply, if at all, only to the waiver of substantive rights. The Ninth Circuit's opinion pays lip-service to the reality

that an agreement to arbitrate is a waiver of only procedural and not substantive rights.[9] Nonetheless, the court's "knowing agreement" standard resembles a test for release of a *substantive* claim. Waiver of a *procedural* right, such as the right of trial by jury, is not subject to the same test as the waiver of *substantive* rights. As the Second Circuit observed in an analogous context, " 'the test of waiver that is applied to other constitutional rights, that there must have been an intentional relinquishment or abandonment of a known right or privilege is not applicable to the right of trial by jury.' " *Washington v. New York City Bd. of Estimate*, 709 F.2d 792, 797 (2d Cir.), (quoting 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2321 at 101 (1971) (footnotes omitted)), *cert. denied*, 464 U.S. 1013 (1983).

In all the foregoing respects, the Ninth Circuit's opinion is incompatible with *Gilmer*. Only if there is something special about the text or history of Title VII could it be said that " 'Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.' " *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors*, 473 U.S. at 628). As shown below, there is nothing special about Title VII that mandates a treatment of a Title VII claim different from that which the Court in *Gilmer* accorded to an ADEA claim.

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[9] 42 F.3d at 1305 (citing *Mitsubishi Motors*, 473 U.S. at 628 (plaintiffs arbitrating statutory claims do not forego substantive rights afforded by statute)).

B. The Ninth Circuit's Opinion Has No Support In The Text Or Legislative History Of The Civil Rights Act Of 1991

Nothing in either the text or the legislative history of the 1991 Act demonstrates any congressional intent to limit *Gilmer*'s holding that arbitration agreements covering statutory employment discrimination claims must be enforced in the same manner as other arbitration agreements. While the 1991 Act reversed or modified several decisions of this Court involving employment discrimination claims, there is no evidence that Congress intended to limit the *Gilmer* decision in any respect. The initial sections of the 1991 Act explicitly announce an intention to reverse this Court's decision in *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989), and other decisions also are reversed or limited in some way in the 1991 Act, including *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), and *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989). The *Gilmer* decision, however, is never mentioned in the 1991 Act. Moreover, the clear language of section 118 of the 1991 Act expressly *"encourages"* arbitration "[w]here appropriate and to the extent authorized by law." Pub. L. 102-166, § 118, 105 Stat. 1071, 1081 (1991) (codified as an historical and statutory note to 42 U.S.C. § 1981 (Supp. 1994)) (emphasis added). The Ninth Circuit's special "knowing agreement" standard, which effectively discourages arbitration, is therefore at odds with the text of the 1991 Act.

The novel "knowing agreement" standard also lacks support in the legislative history of the 1991 Act.[10] The

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[10] Relying on legislative history to vary the plain meaning of a statute violates a cardinal rule of statutory construction:

first fragment of legislative history relied upon by the Ninth Circuit was a quotation from a House of Representatives report purporting to explain the language of section 118 of the 1991 Act. The quotation states in pertinent part: "the committee believes that any agreement to submit disputed issues to arbitration . . . does not preclude the affected person from seeking relief under the enforcement provisions of Title VII." H.R. Rep. No. 40 (I), 102d Cong., 1st Sess. (1991) (reprinted in 1991 U.S.C.C.A.N. 549, 635) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)). This report does not justify the Ninth Circuit's "knowing agreement" standard. The report, generated prior to this Court's decision in *Gilmer*, could not have reflected any intention to overrule or to limit *Gilmer*.[11]

"[w]hen confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 n.29 (1978). Relying on legislative history was particularly inappropriate here because the Ninth Circuit's opinion limits application of the FAA. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 470 (1982) ("an implied repeal must ordinarily be evident from the language or operation of a statute").

[11] The history of the report language on which the Court of Appeals relies refutes any implication that it manifests an intent to limit application of *Gilmer*. The language originally appeared in the committee reports accompanying the Civil Rights Act of *1990, see* S.2104, 101st Cong., 2d. Sess. (1990), which was vetoed by President Bush. The vetoed legislation contained a provision on alternative dispute resolution almost identical to that ultimately adopted by Congress during 1991. *See* H.R. No. 101-856, 101st Cong., 2d. Sess. 13 (1990). The conference report which accompanied that bill was substantively identical to the report language on which the Court of Appeals relies. *Id.* at 26 (Joint Explanatory Statement of the Committee of Conference, § 19). When the vetoed legislation was reintroduced in the next

Rather, the report merely reflected the intention of certain Democratic members of the Committee to draft legislation consistent with this Court's decision in *Alexander v. Gardner-Denver*. These members were incorrect in believing that *Alexander v. Gardner-Denver* would invalidate agreements to arbitrate. The *Gilmer* Court reconciled *Gardner-Denver* with *Mitsubishi Motors* and its progeny, holding that agreements to arbitrate statutory claims are appropriate supplements to the judicial enforcement mechanism. *See Gilmer*, 500 U.S. at 33-35. The Ninth Circuit itself confirms that the House Committee members' beliefs were erroneous, for the court expressly acknowledges that statutory discrimination claims may be submitted to binding arbitration. *See* 42 F.3d at 1303 ("employees may . . . agree to arbitrate statutory employment claims"). Accordingly, the committee report does not provide a sound basis for the Ninth Circuit's invention of a new prerequisite to arbitration of statutory discrimination claims.

Nor is there any such basis in the statement of Senator Dole, which was the other portion of legislative history cited by the Ninth Circuit. 42 F.3d at 1305. Following the Senate negotiations regarding the language of the final compromise bill, Senator Dole, with the support of the Bush Administration and a number of Republican senators, entered a section-by-section analysis of the bill

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Congress, the same language was carried over into the new committee report, dated April 24, 1991. This is the language relied upon by the Court of Appeals. 42 F.3d at 1304. This Court announced its decision in *Gilmer* on May 13, 1991. Thus, the language in the committee report on which the appellate court relies was not written in response to *Gilmer* and could not possibly have reflected an intent to limit that decision.

into the Congressional Record. The Ninth Circuit's opinion quotes one part of Senator Dole's statement, referring to section 118, to support its decision to limit the arbitration of statutory employment discrimination claims. The statement reads, in relevant part:

> This provision *encourages* the use of alternative means of dispute resolution, including binding arbitration, where the parties knowingly and voluntarily elect to use these methods.
>
> In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, *there is no reason to disfavor the use of such forums*. See *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991).

137 Cong. Rec. S15472, S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole) (emphasis added). On its face, Senator Dole's statement expresses encouragement of arbitration, rather than limitation. The Ninth Circuit's distorted interpretation of this fragment of legislative history should be rejected.[12]

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[12] The lack of any radical meaning to Senator Dole's use of the word "knowingly" is confirmed by judicial interpretations that apply the presumption that a party who signs an agreement knows its contents. *See, e.g., Stedor Enterprises, Ltd. v. Armtex, Inc.*, 947 F.2d 727, 733 (4th Cir. 1991) (finding an arbitration agreement enforceable as matter of law against a signing party who "never looked at those forms but simply 'tossed them in the file' "); *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 287-88 (9th Cir. 1988) (absence of "intelligent and knowing waiver" of judicial remedies was "beside the point," since permitting a party to ignore contract provisions and rely on oral statements would mean that " 'language of a contract simply would not matter anymore' " and " 'would become no more than presumptive statements of the parties' intentions, instead

In short, no member of Congress, Democrat or Republican, expressed the belief that the 1991 Act overruled *Gilmer* or changed the law to preclude or limit arbitration of employment discrimination claims which otherwise were arbitrable under existing law. Thus, the Ninth Circuit's opinion misinterprets the 1991 Act in an unpersuasive attempt to justify a deviation from the reasoning of this Court in *Gilmer*.

C. The Ninth Circuit Is Alone Among The Circuits In Its Novel Interpretation Of The 1991 Act

The Ninth Circuit's novel interpretation of Title VII, as amended, places it in conflict with repeated holdings by other circuit courts of appeals that Form U-4 contains a valid and enforceable agreement to arbitrate statutory employment discrimination disputes.[13] The Ninth Circuit's opinion imposes significant limitations on the enforcement of agreements to arbitrate statutory employment discrimination claims that have not been imposed by other circuits. *See, e.g., Metz v. Merrill Lynch, Pierce,*

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of legally enforceable' "); *Coleman v. Prudential Bache Securities, Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986) (sending to arbitrator a party's argument that she "signed the instruments without understanding the importance of the arbitration agreements"); *Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138, 140 (7th Cir. 1985) (absent fraud or duress, "a person who signs a contract cannot avoid his obligations under it by showing that he did not read what he signed").

[13] The Ninth Circuit concluded that "even assuming that appellants were aware of the nature of the U-4 form, they could not have understood that in signing it, they were agreeing to arbitrate sexual discrimination suits. The U-4 form did not purport to describe the types of disputes that were to be subject to arbitration." 42 F.3d at 1305.

Fenner & Smith, Inc., 39 F.3d 1482, 1487-88 (10th Cir. 1994) (Title VII pregnancy discrimination claim); *Kidd v. Equitable Life Assur. Soc. of U.S.*, 32 F.3d 516, 519-20 (11th Cir. 1994) (Title VII race discrimination); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699-700 (11th Cir. 1992) (Title VII sexual harassment claim); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991) (Title VII sex discrimination claim); and *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 306-07, 312 (6th Cir. 1991) (Title VII sex discrimination claim).

All of the foregoing cases required arbitration of statutory employment discrimination claims on the basis of a Form U-4 containing arbitration language substantively identical to the language at issue here. Each form contained simply an agreement to arbitrate "any dispute, claim or controversy," without describing particular disputes or referring to Title VII or analogous state statutes. Thus, the Ninth Circuit's decision conflicts with substantial authority from other circuits as well as this Court's decision in *Gilmer*. Moreover, its "knowingly agreed" standard makes the FAA's application vary according to circuit. Employers who do business both within and outside the jurisdiction of the Ninth Circuit will find themselves with arbitration agreements enforceable elsewhere, but unenforceable in the Ninth Circuit.

III. The Ninth Circuit's Opinion Misreads Title VII To Limit FAA-Mandated Arbitration Of State Statutory Claims

A. State Law And Federal Law Claims Do Not Have The Same Standing

Plaintiffs sued Prudential for various common-law torts and for employment discrimination in violation of

the California Fair Employment and Housing Act, Cal. Gov't Code § 12900 *et seq.* Plaintiff did not sue Prudential for employment discrimination in violation of any federal statute. The Ninth Circuit's mistaken opinion that these state statutory claims must be litigated, if pending in federal court, is unsupported by federal law and contrary to California's strong endorsement of arbitration of such claims.

Contrary to the Ninth Circuit's opinion, there is absolutely no reason to believe Congress intended the 1991 Act to limit binding arbitration of claims under state anti-discrimination statutes, such as the California Fair Employment and Housing Act on which plaintiffs exclusively base their statutory claims here. The Ninth Circuit's requirement of a "knowing agreement" to arbitrate state-law employment discrimination claims is said to stem from the "text and legislative history of Title VII." 42 F.2d at 1304. Yet the language of section 118 of the 1991 Act is limited on its face to disputes under *federal* law, and the legislative history on which the Court of Appeals relied refers solely to Title VII. Accordingly, neither the text of the 1991 Act nor its legislative history show that Congress ever intended to limit binding arbitration of *state law* claims.

The Court of Appeals opined that state law claims have the same status relative to the FAA as Title VII claims because state and federal discrimination laws are in some respects analogous. 42 F.3d at 1303 n.1. This conclusion ignores the Supremacy Clause. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (state law claims must be arbitrated even if intertwined federal law claims are non-arbitrable). Moreover, this Court's decisions in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450

U.S. 728, 745 (1981), and *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987), establish that, simply because a federal claim is arbitration-resistant, does not mean an analogous state claim must be, too.[14]

B. The Ninth Circuit's Holding Interferes With State Statutes Encouraging Arbitration

The Ninth Circuit's holding that the state law employment discrimination claims at issue must be judicially litigated (absent a "knowing" waiver) is not only unsupported by federal law but is at odds with California's endorsement of alternative resolutions of state statutory employment discrimination claims. California, without requiring any special "knowing" waiver, enforces agreements to arbitrate state statutory employment discrimination claims. *See Spellman v. Securities, Annuities & Ins. Services, Inc.*, 10 Cal. Rptr. 2d 427 (Cal. Ct. App. 1992). California also provides for administrative hearings that lack the full regalia of a jury trial. *See* Cal. Gov't Code § 12960 *et seq.* It would be anomalous indeed for Congress to require judicial resolution of state-law claims (absent some subjective "knowing" waiver) that the state itself deems appropriate for non-jury resolution in the absence of any such waiver.

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[14] In *Barrentine*, this Court held that "Congress intended to give individual employees the right to bring their minimum wage claims under the [Fair Labor Standards Act] in court," 450 U.S. at 745, yet in *Perry* the Court ordered arbitration of state wage claims under the FAA, even though the federal wage and hour law, as Title VII, contains a provision protecting parallel state statutes.

The Ninth Circuit's holding that Congress intended *state-law* employment discrimination claims to have special immunity from the full effect of the FAA is thus a serious infringement on a well-established California state policy favoring arbitration of such claims.

C. The Court's Holding Will Encourage More Litigation Of State Law Claims In Federal Court

In creating the "knowing agreement" standard for arbitration of state-law employment discrimination claims, the Ninth Circuit has erected a barrier to arbitration that would not exist under California law. As noted above, California courts enforce agreements to arbitrate state statutory employment discrimination claims. Thus, plaintiffs who seek to avoid their agreement to arbitrate such claims likely will file their cases in federal court and, in reliance on the Ninth Circuit's opinion below, will be able to avoid an order to arbitrate under California case law. *See Spellman*, 10 Cal. Rptr. 2d at 432-34.

Moreover, the Ninth Circuit's emphasis on the advantages of judicial procedures over those in the arbitral forum necessarily will accentuate in the minds of potential plaintiffs and their lawyers the preeminence of the judicial forum and thus, in this context, the federal courthouse. The message sent to plaintiffs by the Ninth Circuit is clear and unmistakable: "the remedies and procedural protections available in the arbitral forum can differ significantly from those contemplated by the legislature. In the sexual harassment context, these procedural protections may be particularly significant." 42 F.3d at 1305. This mistaken endorsement of the federal judicial forum over arbitration conflicts sharply with this Court's

interpretation of the FAA as being designed to overcome "anachronistic judicial hostility to agreements to arbitration." *Mitsubishi Motors*, 473 U.S. at 625 n. 14. Moreover, the implicit invitation to file state-law statutory employment discrimination claims in federal court to circumvent an agreed-upon arbitration process will result in unnecessary additional burdens on federal courts which already are struggling with overcrowded dockets and attendant litigation delays.

IV. The Novel And Unprecedented Decision Of The Ninth Circuit Presents An Important Federal Question Which Should Be Resolved By This Court

The potential impact of the Ninth Circuit's misguided opinion is enormous.[15] The court impliedly has repealed the FAA as it relates to statutory employment discrimination claims; has undermined significantly the vitality of *Gilmer*; has stood the long-standing presumption in favor of arbitrability on its head; has ignored the explicit teachings of this Court and found, instead, fatal deficiencies in arbitral remedies and procedural protections, as well as with arbitrators themselves; has treated arbitration contracts different from other contracts, notwithstanding the existence of an express direction by Congress in the FAA not to do so; has created a debilitating uncertainty for parties to arbitration agreements

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[15] The majority of the Ninth Circuit panel, contrary to the counsel of Judge Norris in his concurring opinion, chose not to decide the case "on the narrow ground that the [NASD] rules do not require the arbitration of employment disputes," 42 F.3d at 1305 (Norris, J., concurring), but rather chose to create a far more general rationale for its decision.

regarding their enforceability in this important area of employment relations;[16] and has ensured that there will be little uniformity in how such agreements are enforced across the federal circuits.[17]

In sum, the decision of the Court of Appeals creates a gale force headwind against further development of an efficient, inexpensive, and workable alternative to the overcrowded dockets, exploding litigation costs, and public antagonism that currently plague judicial proceedings. Many litigants have a greater need for an inexpensive and prompt resolution of their disputes, than for an unaffordable and tardy one. Consistent with the congressional mandate, courts should "encourage," rather than impede, the development of cost-effective systems for alternative, non-judicial resolution of disputes. The unprecedented decision of the Ninth Circuit is directly at

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[16] The Ninth Circuit's "knowing agreement" standard will invite a party to resist arbitration, even when the applicable arbitration agreement expressly requires arbitration of statutory employment discrimination disputes, by claiming that the agreement as to the particular claim at issue was entered into "unknowingly."

[17] The Ninth Circuit's decision not only invalidated thousands of arbitration agreements found in Form U-4's as those agreements relate to Title VII and analogous state-law employment discrimination claims, *see supra*, note 2, but since its rationale equally applies to virtually every agreement to arbitrate, all private arbitration agreements to arbitrate statutory discrimination claims are vulnerable to attack. Predictably, few such agreements presently in effect contain language specifying statutory employment discrimination claims as covered. Indeed, prior to the Ninth Circuit's decision, any such specification would have been superfluous, given this Court's repeated pronouncements on the broad construction that must be given arbitration agreements covered by the FAA.

odds with this important national policy and will exacerbate rather than constructively address this problem.

CONCLUSION

For the reasons stated, Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

DATED: May 22, 1995

Respectfully submitted,

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The PRUDENTIAL INSURANCE CO. OF AMERICA, a New Jersey Corporation, Petitioner-Appellee,

v.

Justine LAI; Elvira Viernes, Respondents-Appellants.

No. 92-55902.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 10, 1993.

Decided Dec. 20, 1994.

Employer sued to compel arbitration of employees' sexual harassment and discrimination claims, and to stay pending state court proceedings on those claims. The United States District Court for the Central District of California, Stephen V. Wilson, J., entered order granting both motions by employer. Employees appealed. The Court of Appeals, Schroeder, Circuit Judge, held that: (1) order compelling arbitration was appealable final decision; (2) issue of arbitrability was for court; and (3) in signing securities exchange registration form, employees did not knowingly forego statutory remedies, and thus arbitration agreement was not binding.

Vacated and remanded.

William A. Norris, Circuit Judge, filed concurring opinion.

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Thomas G. Wood, Brown & Wood, San Francisco, CA, for Securities Industry Ass'n, Inc., for amicus curiae for petitioner-appellee.

Appeal from the United States District Court for the Central District of California.

Before: HUG, SCHROEDER, and WILLIAM A. NORRIS,* Circuit Judges.

Opinion by Judge SCHROEDER,

Concurrence by Judge NORRIS.

SCHROEDER, Circuit Judge:

This is an appeal from a district court order compelling arbitration, under the Federal Arbitration Act, of statutory sexual harassment and discrimination claims. The appellants filed their claims in state court, alleging that while employed by appellee Prudential Insurance Company in 1989 and 1990, they were the victims of serious sexual discrimination and abuse by their supervisor. Prudential then filed this independent action in federal court to compel arbitration.

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*Although Judge Aldisert participated in the oral argument in this case, he recused and did not participate in the final decision. Judge Norris was drawn to replace him and has reviewed the record and briefs and listened to the tape of oral argument.

The district court entered an order compelling arbitration and staying the state court proceedings, based upon the arbitration clause incorporated into the Standard Applications for Securities Industry Registration ("the U-4 forms") appellants signed. We hold that the district court's order is appealable, and we reverse because appellants did not knowingly enter into any agreement to arbitrate employment disputes.

I. BACKGROUND

Justine Lai and Elvira Viernes were employed as sales representatives by the Prudential Insurance Company of America. When applying for their positions, appellants were required to sign U-4 forms containing agreements "to arbitrate any dispute, claim or controversy that . . . is required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which I register." Plaintiffs subsequently registered with the National Association of Securities Dealers, which requires that disputes "arising in connection with the business" of its members be arbitrated.

Plaintiffs allege that when they signed the U-4 forms, they were told only that they were applying to take a test which was required for their employment by Prudential, and that they were simply directed to sign in the relevant place without being given an opportunity to read the forms. Arbitration was never mentioned, and plaintiffs were never given a copy of the NASD Manual, which contains the actual terms of the arbitration agreement.

On November 30, 1990, appellants sued Prudential and their immediate supervisor in state court on a variety

of state law claims, alleging that the supervisor had raped, harassed, and sexually abused them in a number of ways. Prudential then filed this action in federal district court, asking the court to compel arbitration of appellants' state law claims, and to stay the state court proceedings. The district court granted both of Prudential's motions.

II. APPEALABILITY

Before oral argument, this court issued an order to show cause why the appeal should not be dismissed for lack of jurisdiction. Both sides have briefed the jurisdictional issue, and we now hold that we have jurisdiction over the appeal, because the district court's order compelling arbitration was an appealable final decision.

As a general rule, pro-arbitration decisions are not appealable final judgments. The Federal Arbitration Act ("FAA") provides that:

> (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order –
>
> (1) granting a stay of any action under section 3 of this title;
>
> (2) directing arbitration to proceed under section 4 of this title;
>
> (3) compelling arbitration under section 206 of this title; or
>
> (4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16. However, § 16(a)(3) of the FAA contains an exception to the general rule: a party may appeal any "final judgment with respect to an arbitration." 9 U.S.C. § 16(a)(3).

As the appellants in this case correctly point out, every court that has considered the issue to date has concluded that if the motion to compel arbitration in a given case is the only claim before the district court, a decision to compel arbitration is deemed to dispose of the entire case, and permit appellate review under 9 U.S.C. § 16(a)(3). *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir.1994); *S+L+H, S.p.A. v. Miller-St. Nazianz, Inc.*, 988 F.2d 1518 (7th Cir.1993); *Filanto v. Chilewich Int'l*, 984 F.2d 58 (2d Cir.1993); *McDermott Int'l v. Underwriters at Lloyd's*, 981 F.2d 744 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2442, 124 L.Ed.2d 660 (1993); *Stedor Enterprises, Ltd. v. Armtex, Inc.*, 947 F.2d 727 (4th Cir.1991); *Matter of Chung and President Enterprises Corp.*, 943 F.2d 225 (2d Cir.1991); *Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir.1990); *Thompson McKinnon Securities, Inc. v. Salter*, 873 F.2d 1397 (11th Cir.1989). On the other hand, if the motion to compel arbitration is "embedded" in a substantive suit pending before that court, the district court's decision to compel arbitration of some or all of the claims before it is not considered to be final, and therefore not reviewable. *See, e.g., Perera v. Siegel Trading Co.*, 951 F.2d 780 (7th Cir.1992) (district court ordered some claims to arbitration and stayed judicial resolution of the remainder pending arbitration). This interpretation of the FAA is supported by the Practice Commentary following § 16 in the Annotated Code, which states quite plainly that § 16

does permit immediate appellate review of pro-arbitration decisions in independent proceedings. David D. Segal, Practice Commentary following 9 U.S.C.A. § 16 (Supp. 1993). We must decide whether Prudential's suit to compel arbitration in this case is an "independent" or an "embedded" proceeding.

We agree with appellants that the proper focus in such a determination is only on the case appealed. The fact that a separate but related proceeding is pending in state court cannot transform the independent federal court action into an embedded proceeding. *See Miller-St. Nazianz*, 988 F.2d 1518 (order compelling arbitration final appealable order even though related, but separate, case was pending before same judge). The decision to compel arbitration settled everything that was before the district court in this case. Because the case at bar is an independent proceeding in the federal courts, we hold that the district court's order compelling arbitration is an appealable final decision.

III. ARBITRABILITY

The only agreement to arbitrate that appellants actually executed was contained in the U-4 form. Item number 5 on page 4 of the U-4 form states:

> I agree to arbitrate any dispute, claim or controversy that may arise between me or my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which I register. . . .

This provision does not in and of itself bind appellants to arbitrate any particular dispute. To see what appellants possibly could have agreed to arbitrate, we must turn to the arbitration requirements of the NASD, which appellants eventually joined. The NASD manual states:

> Any dispute, claim or controversy eligible for submission under part I of this Code between or among members and/or associated persons . . . arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), shall be arbitrated under this Code. . . .

NASD Manual, Code of Arbitration Procedure ¶ 3708.

Appellants contend that these provisions do not bind them to arbitrate their employment discrimination claims because they were unaware that they signed any document that contained an arbitration clause, they were never given copies of the NASD manual, and they were not otherwise on notice that they might be agreeing to arbitrate employment disputes. They further contend that even if they had known that they were agreeing to the NASD arbitration provision, its language does not cover employment disputes.

Appellants rely on *Alexander v. Gardner-Denver*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), to support their argument that they are not bound to arbitrate their statutory claims. *Alexander* held that an arbitration clause contained in a collective bargaining agreement could not

supplant Title VII's statutory remedies,[1] and the decision was widely interpreted as prohibiting any form of compulsory arbitration of Title VII claims. *See, e.g., Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir.1989), *cert. denied*, 493 U.S. 1045, 110 S.Ct. 842, 107 L.Ed.2d 836 (1990); *EEOC v. Children's Hospital Medical Center*, 719 F.2d 1426, 1431 (9th Cir.1983) (en banc) (court should reach question, and hold that prior consent decree cannot bar later Title VII claims under *Alexander*) (Fletcher, C.J. concurring). The Supreme Court, however, without overruling *Alexander*, subsequently held that individuals may contractually agree to arbitrate employment disputes and thereby waive the statutory rights to which they would otherwise be entitled. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

Gilmer, upon which Prudential heavily relies, made it clear that the ADEA does not bar agreements to arbitrate federal age discrimination in employment claims.[2] Our circuit has extended *Gilmer* to employment discrimination claims brought under Title VII. *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir.1992); *see also Spellman v. Securties, Annunities, & Ins. Svc.*, 8 Cal.App.4th 452, 10 Cal.Rptr.2d 427 (1992) (applying *Gilmer* to state statutory

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[1] Parallel state anti-discrimination laws are explicitly made part of Title VII's enforcement scheme. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 477, 102 S.Ct. 1883, 1895, 72 L.Ed.2d 262 (1982); *Salgado v. Atlantic Richfield*, 823 F.2d 1322, 1326 (9th Cir.1987). Thus, the FAA has the same application to state law claims like those appellants raise as it does to Title VII claims.

[2] Appellants contend that the Civil Rights Act of 1991 overruled that holding. Because of our resolution of this case, we find it unnecessary to reach that issue.

employment discrimination claims). The issue before us, however, is not whether employees may ever agree to arbitrate statutory employment claims; they can. The issue here is whether these particular employees entered into such a binding arbitration agreement, thereby waiving statutory court remedies otherwise available.

The district court did not decide whether the arbitration clause was enforceable, agreeing with Prudential's threshold argument that enforceability of appellants' agreement to arbitrate is a question for the arbitrator to decide in the first instance. Prudential and the district court relied on *Prima Paint Corp. v. Flood & Conklin Manufacturing*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). The issue in *Prima Paint*, however, involved an interpretation of the FAA alone. The Court held that under that statute, the question of whether an entire contract, containing an arbitration clause, had been induced by fraud, was one for the arbitrator to decide. The issue in this case, by contrast, is under what circumstances individuals may be deemed to have waived their rights to pursue remedies created by Title VII and related legislative enactments. The Supreme Court's analysis in *Prima Paint* is therefore not applicable in this case.[3] Questions of whether Congress intended, in the enactment of

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[3] Even under *Prima Paint's* analysis, moreover, the enforceability of this arbitration agreement would be a question for the courts. In *Prima Paint*, the Supreme Court held that under § 4 of the Arbitration Act, courts should decide only disputes that are targeted at the making of the arbitration agreement itself, and not the making of the contract as a whole. Here, however, the contractual challenge relates only to the arbitration clause. The validity or invalidity of the contract created by the U-4 form and its provisions has no bearing whatsoever on this case, aside

other statutes, to prevent or limit the arbitrability of statutory claims have routinely been decided by the courts. *See, e.g., Gilmer,* 500 U.S. 20, 111 S.Ct. 1647 (court decided whether or not employment disputes were arbitrable by looking to whether Congress intended to preclude arbitration of those claims); *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 227-28, 107 S.Ct. 2332, 2337-38, 96 L.Ed.2d 185 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth,* 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *Alexander,* 415 U.S. 36, 94 S.Ct. 1011. Thus, the issue of arbitrability in this case is for the court.

Appellants contend in effect that even after the Supreme Court's decision in *Gilmer,* employees cannot be bound by an agreement to arbitrate employment discrimination claims unless they knowingly agreed to arbitrate such claims. We agree with appellants that Congress intended there to be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies and procedural protections prescribed in Title VII and related state statutes. Such congressional intent, which has been noted in other judicial decisions, is apparent from the text and legislative history of Title VII.

Prior to 1991, of course, Title VII had been interpreted to prohibit any waiver of its statutory remedies in

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from the agreement to arbitrate. *See also McNally Pittsburg, Inc. v. Int'l Assoc. of Bridge, Structural, & Ornamental Iron Workers,* 812 F.2d 615 (10th Cir.1987) (question of whether general contractor had knowingly signed agreement containing arbitration clause was for the court).

favor of arbitration, even a knowing waiver. *See, e.g., Children's Hospital Medical Center,* 719 F.2d at 1431 (relying on *Alexander,* 415 U.S. at 47-51, 94 S.Ct. at 2667-69). As the Supreme Court recognized:

> Legislative enactment in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. In the Civil Rights Act of 1964, Congress indicated that they considered the policy against discrimination to be of the "highest priority." Consistent with this view, Title VII provides for consideration of employment discrimination claims in several forums. And, in general submission of a claim to one forum does not preclude a later submission to another. Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.

415 U.S. at 47-48, 94 S.Ct. at 1019.

This conclusion was reinforced by the recent enactment of the Civil Rights Act of 1991. Section 118 of that Act states: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolutions including, . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." § 118 of Pub.L. 102-166, set forth in the notes following 42 U.S.C. § 1981 (Supp.1994). One House report explained that the purpose of that section was to increase the possible remedies available to civil rights plaintiffs:

> Section 216 [of the 1991 Act] encourages the use of alternative means of dispute resolution

> . . . where appropriate and to the extent authorized by law. . . . The committee emphasizes . . . that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 [94 S.Ct. 1011, 39 L.Ed.2d 147] (1974). The committee does not intend for the inclusion of this section to be used to preclude rights and remedies that would otherwise be available.

HR Rep. No. 40(I) 102nd Cong. 1st Sess., reprinted in 1991 U.S.C.C.A.N. 549, 635. Speaking of proposed § 118, Senator Dole explicitly declared that the arbitration provision encourages arbitration only "where the parties knowingly and voluntarily elect to use these methods." 137 Cong.Rec.S. 15472, S. 15478 (Daily Ed. October 30, 1991, statement of Senator Dole).

This congressional concern that Title VII disputes be arbitrated only "where appropriate," and only when such a procedure was knowingly accepted, reflects our public policy of protecting victims of sexual discrimination and harassment through the provisions of Title VII and analogous state statutes. *See Alexander,* 415 U.S. at 47, 94 S.Ct. at 1019. This is a policy that is at least as strong as our public policy in favor of arbitration. Although the

Supreme Court has pointed out that plaintiffs who arbitrate their statutory claims do not "forego the substantive rights afforded by the statute," *Mitsubishi Motors*, 473 U.S. at 628, 105 S.Ct. at 3354, the remedies and procedural protections available in the arbitral forum can differ significantly from those contemplated by the legislature. In the sexual harassment context, these procedural protections may be particularly significant.[4] Thus, we conclude that a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration. *See* Civil Rights Act of 1991; *cf. Gardner*, 415 U.S. at 51-52, 94 S.Ct. at 1021-22 (discussing possible waiver of Title VII rights); *Gilmer*, 500 U.S. 20, 111 S.Ct. 1647 (clause providing for arbitration of disputes "arising out of the employment or termination of employment" binding on "experienced businessman"); *Mago*, 956 F.2d 932 (same); *Spellman v. Securities Annuities and Insurance Services*, 8 Cal.App.4th 452, 10 Cal.Rptr.2d 427 (1992) (same).

In this case, even assuming that appellants were aware of the nature of the U-4 form, they could not have understood that in signing it, they were agreeing to arbitrate sexual discrimination suits. The U-4 form did not

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[4] In California, for example, the privacy rights of victims of sexual harassment are protected by statutes limiting discovery and admissibility of plaintiffs' sexual history in a judicial proceeding. *E.g.* Cal.Evid.Code §§ 782, 1106; Cal.Civ.Proc.Code § 2017(d). In addition, in an area as personal and emotionally charged as sexual harassment and discrimination, the procedural right to a hearing before a jury of one's peers, rather than a panel of the National Association of Securities Dealers, may be especially important.

purport to describe the types of disputes that were to be subject to arbitration. Moreover, even if appellants had signed a contract containing the NASD arbitration clause, it would not put them on notice that they were bound to arbitrate Title VII claims. That provision did not even refer to employment disputes. Indeed, in a case involving an age discrimination claimant, the Seventh Circuit has held that as a matter of law the NASD provision relevant to this appeal did not cover employment disputes. *Farrand v. Lutheran Broth.*, 993 F.2d 1253 (7th Cir.1993); *but see Kidd v. Equitable Life Assurance Society*, 32 F.3d 516 (11th Cir. 1994). Our decision does not rest exclusively upon the precise language of the clause in the U-4 manual, for it is clear and undisputed on this record that the employment contract with Prudential that plaintiffs executed did not describe any disputes the parties agreed to arbitrate.

We therefore hold that appellants were not bound by any valid agreement to arbitrate these employment disputes, because they did not knowingly contract to forego their statutory remedies in favor of arbitration.

The order of the district court is VACATED AND THE MATTER REMANDED for the district court to dismiss Prudential's complaint.

WILLIAM A. NORRIS, circuit Judge, concurring.

In *Farrand*. . . . , a case decided after the district court order in this case, the Seventh Circuit disposed of an appeal identical to the one before us on the narrow ground that the National Association of Securities Dealers (NASD) rules do not require the arbitration of employment disputes. I agree with *Farrand*, as does the majority. *See* op. at 1305. I also agree with the Seventh

Circuit that the inapplicability of the NASD arbitration rules to employment disputes is dispositive of the question of whether an employee governed by those rules may be required to arbitrate a discrimination claim.

The majority, however, for reasons that escape me, finds it necessary to go on to hold (1) that Congress intended that employees can only *knowingly* waive their right to adjudicate employment discrimination claims, and (2) that the particular employees in this case did not knowingly waive that right. I express no opinion on either of these issues because I see no need to reach them. I am concerned, however, that the majority engages in appellate fact-finding by holding that these particular employees did not knowingly waive their trial rights, even though the district court never made a finding on the issue. The question of a knowing waiver of rights is so highly fact-sensitive that it should rarely, if ever, be decided in the first instance by an appellate court.

I concur in the judgment for the reasons stated in *Farrand*.

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE PRUDENTIAL INSURANCE CO. OF AMERICA, a New Jersey Corporation, Petitioner-Appellee, v. JUSTINE LAI; ELVIRA VIERNES, Respondents-Appellants.	No. 92-55902 D.C. No. CV-92-1005-SVW (Central California) ORDER (Filed Feb. 21, 1995)

Before: HUG, SCHROEDER, and NORRIS,* Circuit Judges.

The pane as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Although Judge Aldisert participated in the oral argument in this case, he recused and did not participate in the final decision. Judge Norris was drawn to replace him and has reviewed the record and briefs and listened to the tape of oral argument.

Kenwood C. Youmans, Esq.
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
2029 Century Park East
Suite 3300
Los Angeles, CA 90067

rc
92-55902

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a New Jersey corporation, Plaintiff, v. JUSTINE LAI and ELVIRA VIERNES, Defendants.	CV 92-1005 SVW (CTx) ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL ARBITRATION AND MOTION TO STAY STATE COURT LITIGATION (Filed June 11, 1992)

Plaintiff moves pursuant to the Federal Arbitration Act to compel arbitration of a sexual harassment claim and several related claims brought against it by Defendants in Los Angeles Superior Court. Defendants oppose. For the reasons outlined below, arbitration is ordered.

Defendants are both sales representatives for Plaintiff Prudential. On November 30, 1991, Defendants filed suit against Plaintiff in Los Angeles Superior Court alleging sexual harassment and several other related claims.[1] The essence of Defendants' allegations was that their supervisor at Prudential made sexual advances upon them,

[1] In addition to sexual harassment, Defendants alleged assault, battery, intentional infliction of emotional distress, and negligent supervision.

coerced them into removing their clothing, and engaged in "sexual assault, including forced acts of fellatio, sexual intercourse and masturbation" upon them, all while Defendants were on the job.

It is undisputed that before or during the course of their employment, but in any event before the acts of sexual harassment are alleged to have occurred, Defendants signed standardized forms, called "U-4 forms," in which they agreed to "arbitrate any dispute, claim or controversy that may arise" between them and Prudential "that is required to be arbitrated under the rules . . . of the organizations" with which Defendants were registered. It is also undisputed that Defendants are registered with the National Association of Securities Dealers (NASD), under whose rules arbitration is required for "any dispute, claim or controversy . . . *arising in connection with the business* of [NASD] members." (Emphasis added).

What *is* in dispute is whether Defendants' sexual harassment claims and related claims are claims "arising in connection with the business of" Prudential. Defendants argue that they aren't. They reason that their claims arise out of sexual harassment, and Prudential's "business" is the business of selling insurance, not the business of sexual harassment. Plaintiff for its part argues that "in connection with the business" of Prudential encompasses Defendants' claims because employment is part of Prudential's overall business, and the acts Defendants' supervisor allegedly committed were committed while Defendants were on the job.

The Court does not subscribe to either side's view of the issue. It is immaterial whether Plaintiff's business is defined as consisting exclusively of selling insurance, or whether it is defined as encompassing employment. What matters instead are the terms, "arising out of" and "in connection with". In the Court's view, these two terms are so broad that the nexus between the alleged on-the-job sexual harassment and Prudential's business appears sufficiently close for purposes of arbitration regardless of how exactly Prudential's business is defined.

Even if the Court's view is not the only possible interpretation of the arbitration agreement, arbitration is still warranted. So strong is the federal policy favoring arbitration that a claim will not be deemed to fall outside the scope of an arbitration provision "unless it may be said with positive assurance that the arbitration clause is *not* susceptible of an interpretation that covers the asserted dispute." *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 860 (9th Cir.), *cert. denied*, 444 U.S. 827, 100 S.Ct. 51 (1979) (*quoting United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S.Ct. 1347, 1352-53 (1960)) (emphasis added); *accord Marchese v. Shearson Hayden Stone, Inc.*, 734 F.2d 414, 419 (9th Cir. 1984); *see also Moses H. Cone Hospital v. Mercury Const. Corp.*, 460 U.S. 1, 24-25, 1034 S.Ct. 927, 941 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"). The arbitration agreement is not only "susceptible," to put it mildly, of the interpretation offered above by the Court. It is even "susceptible" of the interpretation offered by Plaintiff. The Court thus cannot deem Defendants' claims to be

outside the scope of the arbitration agreement between the parties.

Defendants make three further objections to arbitration. They first argue that notwithstanding whether their claims fall within the scope of the arbitration agreement, the arbitration agreement itself is invalid because Defendants were fraudulently induced into signing the "U-4" form within which the arbitration agreement was contained. The trouble with this argument is that it fails *as an argument for this Court denying Plaintiff's motion,* because whether a contract containing an arbitration clause was procured by fraud is an issue for the arbitrator, not the court, to decide. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967); *Merrill Lynch, Pierce, Fenner & Smith v. Hovey,* 726 F.2d 1286, 1290 (8th Cir. 1984).

Defendants also contend that the arbitration agreement is unenforceable because in signing it, they did not *knowingly* give up their right to a jury trial. This argument, however, is precluded by the well-established principle that arbitration agreements need not include an express waiver of a jury trial. *See, e.g., Madden v. Kaiser Found. Hosps.*, 17 Cal. 3d 699, 713, 131 Cal. Rptr. 882, 891 (1976).

One last argument hinted at by Defendants is that their claims should not be arbitrated because Congress or the California state legislature did not intend for such claims to be arbitrated. It is true that the Federal Arbitration Act does not apply when the text or legislative history of the statute implicated in a dispute explicitly precludes arbitration, or there is an inherent conflict

between arbitration and the statute's underlying purpose. *See, e.g., Shearson/American Exp., Inc. v. McMahon*, 107 S. Ct. 2332, 2337-38 (1987). However, the burden is on the party opposing arbitration to show that arbitration was not intended to apply to the statute at issue. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991). Here, the text of the statute upon which Defendants mainly rely – Cal. Govt. Code § 12900 et seq. – does not preclude arbitration, and Defendants have offered absolutely no evidence that the California state legislature intended to preclude arbitration of their claims. Nor have Defendants offered any evidence whatsoever that there is an inherent conflict between arbitration and the statute on which Defendants are basing their claims.

For the foregoing reasons, the Court hereby GRANTS pursuant to the arbitration agreement between the parties and the Federal Arbitration Act, 9 U.S.C. § 1 et seq., Plaintiff's Motion to Compel Arbitration, and Plaintiff's corresponding Motion to Stay State Court Litigation.

IT IS SO ORDERED.

DATED: June 10, 1992

/s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

FORM U-4
UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is an amendment to this page, complete only Item 23 and Items being amended.

FIRM CRD #	SOCIAL SECURITY #	APPLICANT'S CRD #
5685	177-62-6454	
FIRM NFA #		APPLICANT'S NFA #
N/A		N/A

THE APPLICANT MUST READ THE FOLLOWING VERY CAREFULLY

1. I swear or affirm that I have read and understand the items and instructions on this form and that my answers (including attachments) are true and complete to the best of my knowledge. I understand that I am subject to administrative, civil or criminal penalties if I give false or misleading answers.
2. I hereby apply for registration with the organizations and states indicated in Item 10 as may be amended from time to time and, in consideration of such organizations and states receiving and considering my application, I submit myself to the jurisdiction of such states and organizations and hereby certify that I agree to abide by, comply with, and adhere to all the provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the states and organizations as they are and may be adopted, changed or amended from time to time, and I agree to comply with, be subject to and abide by all such requirements and all rulings, orders, directives and decisions of, and penalties, prohibitions and limitations imposed by such states and organizations, subject to right of appeal as provided by law; and I agree that any decision of such states and organizations as to the results of any examination(s) that I may be required to pass will be accepted by me as final.
3. I further agree that neither the states or organizations nor their officers, employees, and others acting on their behalf shall be liable to me for action taken or omitted to be taken in official capacity or in the scope of employment, except as otherwise provided in the statutes, constitutions, certificates of incorporation, by-laws or the rules and regulations of such states and organizations.
4. I authorize the states and organizations to make available to any employer or prospective employer, or to any federal, state or municipal agency, or any securities or commodities industry self-regulatory organization any information they may have concerning me; and I release the states and organizations, their employees and agents, from any and all liability of whatever nature by reason of furnishing such information.
5. I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in item 10 as may be amended from time to time.
6. I, the undersigned, for the purpose of complying with the laws of the State(s) designated in Item 10 as may be amended from time to time, relating to sale of securities or commodities, hereby irrevocably appoint the administrator, of each of those State(s), or such other person designated by law, and the successors in such office, my attorney in said State(s) upon whom may be served any notice, process or pleading in any action or proceeding against me arising out of or in connection with the offer or sale of securities or commodities, or out of the violation or alleged violation of the aforesaid laws of said State(s) and I do hereby consent that any such action or proceeding against me may be commenced in any court of competent jurisdiction and proper venue within said State(s) by service of process upon said appointee with the same effect as if I were a resident in said States and had lawfully been served with process in said State(s). It is requested that a copy of any notice, process or pleading served hereunder be mailed to me at my residence.
7. I authorize and request any and all of my former employers and any other person to furnish to the agency, jurisdiction or organization with which this application is being filed, or any agent acting on its behalf, any information they may have concerning my credit worthiness, character, ability, business activities, education background, general reputation, together with, in the case of former employers, a history of my employment by them and the reasons for the termination thereof. Moreover, I hereby release each such employer and each such other person from any and all liability of whatever nature by reason of furnishing such information to the agency, jurisdiction or organization or any agent acting on its behalf. Further, I recognize that I may be the subject of an investigative consumer report ordered by the agency, jurisdiction, or organization with which this application is being filed, and as to which I hereby waive any requirement of prior notification. I understand that I have the right to request complete and accurate disclosure by such agency, jurisdiction or organization of the nature and scope of the investigation requested.
8. I understand and certify that the representations herein apply to all employers with whom I seek registration as shown in Items 4 and 9 of this form. I agree to update Form U-4 by causing an amendment to be filed on a timely basis whenever changes occur to answers previously reported on the form. Further, I represent that to the extent any information previously submitted is not amended, such information is currently accurate and complete.
9. If I have become temporarily registered as an agent, I acknowledge that this application for registration with the state(s) and/or organization(s) indicated in Item 10 is separate and distinct from any temporary registration already obtained with the state(s) and/or organization(s). I further understand that under the law(s) of the state(s) and/or the regulation(s) of the organization(s), my registration may be denied, suspended or revoked.

1 (Month) 26 (Day) 89 (Year)

X _____
SIGNATURE OF APPLICANT

JUSTINE LAI
TYPE OR PRINT NAME OF APPLICANT

THE FIRM MUST COMPLETE THE FOLLOWING

To the best of my knowledge and belief, the applicant is currently bonded where required, and, at the time of approval, will be familiar with the statute(s), constitution(s), rules and by-laws of the agency, jurisdiction or self-regulatory organization with which this application is being filed, and the rules governing registered persons, and will be fully qualified for the position for which application is being made herein. I agree that, notwithstanding the approval of such agency, jurisdiction or organization which hereby is requested, I will not employ the applicant in the capacity stated herein without first receiving the approval of any authority which may be required by law. This firm has communicated with all of the applicant's previous employers for the past three years (five years for commodities).

EMPLOYER	NAME OF PERSON CONTACTED	POSITION OF PERSON CONTACTED	EMPLOYED FROM	EMPLOYED TO	NOW CONTACTED		
PIZZA MAN	JOHN H. SEALOCK, CLU	MGR	12/83	1/89			X
LEE SON ENTERPRISES	JAMES CHANG	MGR	1/82	12/83	X		
CORNING GLASS WORK	JOHN H. SEALOCK, CLU	MGR	1/77	1/82			X

IN ADDITION, I HAVE TAKEN APPROPRIATE STEPS TO VERIFY THE ITEMS AND ATTACHMENTS CONTAINED IN THIS APPLICATION.

THE APPROPRIATE SIGNATORY AREA *MUST BE* COMPLETED ON ALL INITIAL, TRANSFER OR AMENDMENT FILINGS.

FEB 08 1989
MONTH DAY YEAR

SIGNATURE OF APPROPRIATE SIGNATORY

LINDA L. BUETTNER
TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

BEST AVAILABLE COPY

THE FOLLOWING SHOULD BE READ VERY CAREFULLY BY THE APPLICANT

1. I hereby certify that I have read and understand the foregoing statements and that my responses are true and complete to the best of my knowledge.

2. I hereby apply for registration with the organizations and states indicated in Question 8 and, in consideration of such organizations and states receiving and considering my application, I submit myself to the jurisdiction of such states and organizations and hereby certify that I have read, understand and agree to abide by, comply with, and adhere to all the provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the states and organizations as they are and may be adopted, changed or amended from time to time, and I agree to comply with, be subject to and abide by all such requirements and all rulings, orders, directives and decisions of, and penalties, prohibitions and limitations imposed by such states and organizations, subject to right of appeal as provided by law; and I agree that any decision of such states and organizations as to the results of any examination(s) that I may be required to pass will be accepted by me as final.

3. I further agree that neither the states or organizations nor their officers, employees, and others acting on their behalf shall be liable to me for action taken or omitted to be taken in official capacity or in the scope of employment, except as otherwise provided in the statutes, constitutions, certificates of incorporation, by-laws or the rules and regulations of such states and organizations.

4. I authorize the states and organizations to make available to any employer or prospective employer, or to any federal, state or municipal agency, or any securities or commodities industry self-regulatory organization any information they may have concerning me; and I release the states and organizations, their employees and agents, from any and all liability of whatever nature by reason of furnishing such information.

5. I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in Question 8.

6. I, the undersigned, for the purpose of complying with the laws of the State(s) I have designated in Item 8 relating to either the registration or sale of securities or commodities, hereby irrevocably appoint the administrator, of each of those State(s), or such other person designated by law, and the successors in such office, my attorney in said State(s) upon whom may be served any notice, process of pleading in any action or proceeding against me arising out of or in connection with the offer or sale of securities or commodities, or out of the violation or alleged violation of the aforesaid laws of said State(s) and I do hereby consent that any such action or proceeding against me may be commenced in any court of competent jurisdiction and proper venue within said State(s) by service of process upon said appointee with the same effect as if I was a resident in said State and had lawfully been served with process in said State(s). It is requested that a copy of any notice, process or pleading served hereunder be mailed to me at my residence.

NOTARIZATION OF APPLICANT'S SIGNATURE

3-29-85 — DATE — SIGNATURE OF WITNESS

3-29-85 — DATE — SIGNATURE OF APPLICANT

WITNESS MUST BE ONE OF THE FOLLOWING. PLEASE CHECK APPROPRIATE BOX.

☐ PARTNER OF THE FIRM ☐ BRANCH OFFICE MANAGER

☐ OFFICER OF THE CORPORATION ☒ AUTHORIZED EMPLOYEE

OFFICIAL SEAL
CICVANNA A IORIO
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My Comm. expires NOV 2, 1985

_____ — SEAA-NASD CRD NO

STATE OF California COUNTY Los Angeles ss

SUBSCRIBED AND SWORN BEFORE ME THIS 27 DAY OF March A.D. 19 85 BY Giovanna A. Iorio
NOTARY PUBLIC

MY COMMISSION EXPIRES 11/2/1986 COUNTY OF Los Angeles STATE OF California

To the best of my knowledge and belief, the applicant is currently bonded where required, and, at the time of approval, will be familiar with the statute(s), constitution(s), rules and by-laws of the agency, jurisdiction or self-regulatory organization with which this application is being filed, and the rules governing registered persons, and will be fully qualified for the position for which application is being made herein. I agree that, notwithstanding the approval of such agency, jurisdiction or organization which hereby is requested, I will not employ the applicant in the capacity stated herein without first receiving the approval of any authority which may be required by law. This firm has communicated with all the previous employers of the applicant during the past three years, as set forth below:

EMPLOYER	NAME OF PERSON CONTACTED	POSITION OF PERSON CONTACTED	EMPLOYED FROM	EMPLOYED TO	OK	LETTER	NO GOOD
THE PRUDENTIAL	HOME OFFICE PERSONNEL FILE		10-84	PRESENT			
THELMA V. BUAN M.D. INC.	Thelma Buan	OWNER	0/82	10/84	X		
HMLAYANG FILIPINO	UNABLE TO VERIFY		7/79	6/82			

Please Do Not Write In This Area

In addition, I have taken appropriate steps to verify the statements contained in this application and to inquire into the past record and reputation of the applicant.

JUN 12 1985 — DATE — Barbara B. Sinkel — PRINT NAME OF APPROPRIATE SIGNATORY

SIGNATURE OF APPROPRIATE SIGNATORY

Rev. Form U-4 1 81

App. 24

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Supreme Court, U.S.
FILED
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(2)

No. 94-1923

In The

Supreme Court of the United States

October Term, 1995

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Petitioner,

v.

JUSTINE LAI and ELVIRA VIERNES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether Congress intended there to be a "knowing agreement" to arbitrate federal and state statutory employment discrimination claims before an employee may be deemed to have waived the statutory court remedies of Title VII and related state statutes.

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No. 94-1923

In The

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THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Petitioner,

v.

JUSTINE LAI and ELVIRA VIERNES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Justine Lai and Elvira Viernes, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 42 F.3d 1299 (9th Cir. 1994).

STATEMENT OF THE CASE

Justine Lai and Elvira Viernes (hereinafter "plaintiffs") filed suit against The Prudential Insurance Company of America (hereinafter "Prudential") in Los

Angeles Superior Court alleging sexual harassment under the California Fair Employment and Housing Act (hereinafter "FEHA"), California Government Code §12900 *et seq.* and related tort causes of action.[1] Plaintiffs alleged that their supervisor at Prudential sexually harassed and sexually assaulted them by subjecting them to, among other things, forced acts of fellatio, sexual intercourse and masturbation. Petitioner's Appendix (hereinafter "App.") 3-4, 18-19.

Prudential filed a Petition to Compel Arbitration and Stay State Court Proceedings under the Federal Arbitration Act (hereinafter "FAA"), 9 U.S.C. §1 *et seq.* in the United States District Court for the Central District of California. App. 18. The district court granted Prudential's Petition. App. 22. The Ninth Circuit vacated the district court's order and remanded the case with instructions to dismiss Prudential's complaint. App. 14.

Plaintiffs worked for Prudential as sales representatives. Before or during the course of their employment, plaintiffs were required to sign Uniform Applications for Securities Industry Registration (hereinafter "U-4 forms") containing agreements "to arbitrate any dispute, claim or controversy that . . . is required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which I register." App. 3. Plaintiffs registered with the National Association of Securities Dealers (hereinafter "NASD") which required that "any dispute, claim or

---

[1] The related tort causes of action are for: (1) assault; (2) battery; (3) intentional infliction of emotional distress; and (4) negligent supervision.

controversy . . . arising in connection with the business of [NASD] members" be arbitrated. App. 3, 19.

Plaintiffs allege that when they signed the U-4 forms, they were told that they were applying to take a test, that they were directed to sign the forms without being given an opportunity to read them, that no one at Prudential mentioned arbitration, and that they were never given a copy of the NASD manual, which identifies those disputes required to be arbitrated. App. 3.

The district court granted Prudential's petition based on its broad interpretation of the NASD arbitration provision, which required "business disputes" to be arbitrated. It concluded that the NASD arbitration clause covered employment disputes. App. 20.

The Ninth Circuit reversed on two grounds. First, it held that Congress intended there to be a "knowing agreement" to arbitrate employment disputes before an employee may be deemed to have waived the statutory court remedies of Title VII and related state statutes. App. 14. Given that the U-4 form did not describe the types of disputes that were to be arbitrated, the appellate court concluded that plaintiffs could not have known that they were agreeing to arbitrate sex discrimination claims. In addition, the Ninth Circuit held that even assuming plaintiffs signed an arbitration agreement containing the NASD arbitration provision, they would not have known that they were agreeing to arbitrate Title VII claims because the NASD arbitration provision did not cover employment disputes.

Prudential then filed a petition for rehearing and suggestion for rehearing en banc which was denied.

REASONS WHY THE PETITION SHOULD BE DENIED

Prudential seeks review of the Ninth Circuit's holding that Congress, when enacting the Civil Rights Act of 1991, intended that there be a "knowing agreement" to arbitrate before an employee will be deemed to have waived the statutory court remedies of Title VII and related state statutes. Review by this Court is unnecessary for three simple reasons.

First, although the Ninth Circuit's decision rests on two separate holdings, Prudential does not seek review of the holding which is dispositive of the ultimate outcome of this case. Even assuming this Court were to grant review and decide in Prudential's favor, the Ninth Circuit's second holding, that the NASD arbitration provision requiring arbitration of "business disputes" does not include employment disputes, will remain intact and determines the final outcome of this case.

Second, the Ninth Circuit is the first circuit court to address the question of congressional intent relating to agreements to arbitrate federal and state statutory discrimination claims, as reflected in the text and legislative history of the Civil Rights Act of 1991. Therefore, no square conflict exists for this Court to resolve.

Finally, by amending its code of arbitration procedure in October, 1993, specifically to include employment disputes, the NASD effectively resolved the

primary and determinative issue of this case and substantially diminished the potential impact of the Ninth Circuit's opinion.

For these reasons, review by this Court is neither appropriate nor necessary and should be denied.

1. The Question Raised By Prudential Is Not Dispositive Of The Ultimate Outcome Of This Case

Plaintiffs will retain their right to statutory court remedies, even if this Court were to grant review and decide that they "knowingly agreed" to arbitrate "business disputes", because the Ninth Circuit's holding that "business disputes" does not include employment disputes is final and dispositive of the outcome of this case.

A. The Ninth Circuit's Decision Rests On Two Separate Holdings

The question raised before the Ninth Circuit was one of arbitrability: whether plaintiffs entered into a binding agreement to arbitrate their federal and state statutory employment discrimination claims. App. 9.

The Ninth Circuit found the agreement to arbitrate contained in the U-4 forms executed by plaintiffs to be unenforceable for two reasons. Based on its review of the text and legislative history of the Civil Rights Act of 1991, the Ninth Circuit found that Congress intended individuals to "knowingly agree" to arbitrate federal and state statutory employment discrimination claims and that, by executing their U-4 forms, plaintiffs did not "knowingly contract to forego their statutory remedies in favor of

arbitration." App. 14. This first holding was based on the undisputed fact that the "U-4 form did not purport to describe the types of disputes that were to be subject to arbitration." App. 13-14.

The Ninth Circuit also decided the underlying question of the proper interpretation of the NASD arbitration provision requiring arbitration of business disputes and held, as did the Seventh Circuit in *Farrand v. Lutheran Brotherhood*, 993 F.2d 1253, 1255 (7th Cir. 1993), that it did not cover employment disputes.[2] App. 14.

Prudential raises only the question of whether the Ninth Circuit properly interpreted Title VII, as amended by the Civil Rights Act of 1991, to require a "knowing agreement" to arbitrate federal and state statutory employment discrimination claims and not the ultimately determinative question of whether the Ninth Circuit properly interpreted the NASD arbitration provision. Petition, 7-8.

B. Even if This Court Were To Rule In Prudential's Favor On The Question Presented, The Outcome Of This Case Would Be The Same

Review by this court of the question raised by Prudential will not change the ultimate outcome of this case. Assuming *arguendo* that this Court were to grant review and rule in Prudential's favor that plaintiffs entered into

---

[2] The NASD arbitration provision was amended in October, 1993, to specifically include employment disputes. See Section 3, *infra*.

an enforceable agreement to arbitrate "business disputes," the Ninth Circuit's second holding would determine the ultimate outcome of this case. Because Prudential has not raised the question of the proper construction of the pre-amendment NASD arbitration provision, the Ninth Circuit's holding that said provision does not include employment disputes is final and not subject to further review. Therefore notwithstanding a decision from this Court in Prudential's favor, plaintiffs would not be required to arbitrate their sex discrimination claims.

2. The Ninth Circuit's Opinion Does Not Squarely Conflict With Decisions Of This Court And Other Circuit Courts

Prudential asserts that the Ninth Circuit's opinion conflicts with this Court's decisions in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Allied-Bruce Terminix Companies, Inc. v. Dobson*, ___ U.S. ___, 115 S.Ct. 834 (1995) and other circuit court decisions. However, neither this Court nor other circuit courts have addressed and decided the question raised by Prudential: whether Title VII, as amended by the Civil Rights Act of 1991, requires a "knowing agreement" to arbitrate federal and state statutory employment discrimination claims. Therefore, no square conflict exists which requires resolution by this Court.

A. The Ninth Circuit's Opinion Is Consistent With This Court's Decision In *Gilmer* And Its Progeny

Prior to this Court's decision in *Gilmer*, Title VII had been interpreted to prohibit prospective waivers of the right to a judicial forum for Title VII claims. *Alexander v. Gardner - Denver Co.*, 415 U.S. 36, 51-52 (1974). In *Gilmer*, however, this Court held that claims brought under the Age Discrimination Employment Act ("ADEA"), 20 U.S.C. §621 *et seq.* may be the subject of an arbitration agreement, enforceable under the FAA. *Gilmer*, 500 U.S. at 35.

Gilmer has been extended to apply to claims brought under Title VII as well. *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487-88 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699-700 (11th Cir. 1992); *Mago v. Shearson Lehman Hutton. Inc.*, 956 F.2d 932, 935 (9th Cir. 1992); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307 (6th Cir. 1991).

The Ninth Circuit strictly adhered to the holding of *Gilmer* and based its decision on the underlying premise that Title VII claims may be subject to an arbitration agreement. App. 9. Thus the Ninth Circuit's opinion does not squarely conflict with the holding of *Gilmer*.

In support of its argument that the Ninth Circuit improperly refused to enforce the arbitration agreement contained in the U-4 form, Prudential relies heavily on *Gilmer* and its unfounded contention that *Gilmer* is determinative of the question presented. However, Gilmer is

distinguishable from the present case in several material respects.

The plaintiff in *Gilmer,* unlike plaintiffs in this case who registered with the NASD, registered with the New York Stock Exchange (hereinafter "NYSE"). Rule 347 of the NYSE specifically provided for arbitration of "any controversy . . . arising out of the employment or termination of employment of such registered representative." *Gilmer,* 500 U.S. at 23. Based on *Gilmer's* execution of a U-4 form *and* the NYSE rules which specifically provided for arbitration of employment disputes, this Court concluded that *Gilmer* entered into an enforceable agreement to arbitrate his ADEA claim.

Moreover, Congress passed the Civil Rights Act of 1991 shortly after this Court handed down its decision in *Gilmer.* Therefore, this Court did not have the opportunity to address the question of whether the text and legislative history of the Civil Rights Act of 1991 reflects a congressional intent to require "knowing agreements" to arbitrate federal and state statutory discrimination claims. In addition, no other circuit court has considered and decided this precise issue.[3]

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[3] None of the cases cited by Prudential as being in conflict with the Ninth Circuit's opinion addressed this issue. (See Petition, p. 12 fn. 6; 23-24.) *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 39 F.3d 1482 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.,* 971 F.2d 698 (11th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.,* 948 F.2d 305 (6th Cir. 1991); and *Alford v. Dean Witter Reynolds, Inc.,* 939 F.2d 229 (5th Cir. 1991) (Title VI claims may be subject to mandatory arbitration.) *Kidd v. Equitable Life Insurance Soc. of U.S.,* 32 F.3d 516 (11th Cir. 1994) (the NASD arbitration provision requiring arbitration of business disputes included employment disputes.)

Thus, the "knowing agreement" standard articulated by the Ninth Circuit has not been considered or rejected by any court of appeals or this Court. Accordingly, no square conflict exists which requires resolution by this Court.

Prudential also contends that the Ninth Circuit's opinion is "incompatible with *Gilmer.*" Petition, p. 18. Even assuming that an incompatibility exists, it does not rise to the level of a square conflict requiring this Court's review.

Furthermore, Prudential's claim of incompatibility is illusory. In *Gilmer,* this Court rejected challenges to the adequacy of the NYSE arbitration procedures and concluded that the procedures adequately protected *Gilmer's* substantive rights. *Gilmer,* 500 U.S. at 30-32. Prudential incorrectly asserts that "the Ninth Circuit denied enforcement of an otherwise valid arbitration agreement by relying on the 'particularly significant' procedural protections . . . available to a plaintiff in a Title VII sexual harassment lawsuit." (Petition p. 17.) The Ninth Circuit did no such thing.

Rather, the court cited to the procedural protections available in California to Title VII plaintiffs as further justification for its conclusion that Congress intended to require "knowing" agreements to arbitrate Title VII claims and not as a basis for denying "an otherwise valid arbitration agreement." App. 13.

Prudential also strains to create an inconsistency with *Gilmer* by suggesting that the Ninth Circuit posed a conflict between policies favoring arbitration and those

forbidding discrimination that "the Court in *Gilmer* already had debunked." Petition p. 17.

A review of the Ninth Circuit's opinion reveals no such inconsistency. Rather, the court merely stated that "the public policy of protecting victims of sexual discrimination and harassment," which is at least as strong as the policy in favor of arbitration, underlies Congress' intent that Title VII claims be arbitrated only " 'where appropriate' " and when "knowingly" accepted. App. 12.

Finally, Prudential claims that the "knowing agreement" standard conflicts with one of the underlying principles of this Court's decision in *Gilmer*: an agreement to arbitrate statutory claims involves only a waiver of the right to a judicial forum and not a waiver of substantive rights afforded by the statute. Petition, 17. Prudential suggests that the "knowing agreement" standard resembles a test for waiver of substantive rights and is therefore inconsistent with *Gilmer* and *Washington v. New York City Bd. of Estimate*, 709 F.2d 792, 797 (2d Cir. 1983) ("the test of waiver that is applied to other constitutional rights . . . is not applicable to the right to trial by jury.").

Prudential's claim of inconsistency in principle is unfounded. The Ninth Circuit based its "knowing agreement" standard on Section 118 of the Civil Rights Act of 1991 ("Where appropriate and to the extent authorized by law, . . . arbitration, is encouraged.") and its legislative history ("where the parties knowingly and voluntarily elect to use these methods"), and not on any distinction between the waiver of procedural and substantive rights.

Congressional intent is determinative of the question before this Court. Any claimed comparison of the "knowing agreement" standard to a test for waiver of substantive rights is irrelevant to the question presented for review.

B. The Ninth Circuit's Opinion Is Consistent With This Court's Decision In *Allied-Bruce Terminix Companies, Inc. v. Dobson* and *First Options of Chicago v. Kaplan*

Prudential claims that the Ninth Circuit's "knowing agreement" standard "conflicts with this Court's recent opinion in *Allied-Bruce Terminix Companies, Inc v. Dobson*, ___ U.S. ___, 115 S.Ct. 834 (1995), fosters pre-arbitration collateral litigation and undermines the purpose of the FAA. Petition 8, 13-14. Prudential's arguments are fundamentally flawed in several respects.

In *Allied-Bruce Terminix*, this Court broadly interpreted Section 2 of the Federal Arbitration Act, which makes enforceable a written arbitration provision in "a contract evidencing a transaction involving commerce," to mean that the transaction, in fact, involved interstate commerce, even if the parties did not contemplate an interstate commerce connection. *Id.* at 893.

In so holding, this Court rejected an interpretation adopted by other courts requiring the parties to a contract to have "contemplated" an interstate commerce connection. *Id.* at 841. In an effort to create a conflict where none exists, Prudential relies on the following rhetorical

question posed by this Court when rejecting the "contemplation of the parties" interpretation: "Why would Congress intend a test that risks the very kind of costs and delay through litigation (about the circumstances of contract formation) that Congress wrote the Act to help the parties avoid? (citations omitted.)" *Id.*

Based on the above-cited rhetorical question, Prudential asserts that the "knowing agreement" standard "promises to foster pre-arbitration collateral litigation, contrary to an important purpose of the FAA to limit litigation." Petition, p. 13. By posing its rhetorical question, this Court did not suggest that allowing a court to decide arbitrability issues, such as whether an employee "knowingly agreed" to arbitrate Title VII claims, is contrary to the purpose of the FAA. Moreover, Prudential's argument is based on a gross mischaracterization of the underlying purpose of the FAA and is inconsistent with this Court's decision in *First Options of Chicago, Inc. v. Kaplan*, ___ U.S. ___, 115 S.Ct. 1920 (1995).

"[T]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate (citation omitted)." *Allied-Bruce Terminix*, ___ U.S. at ___, 115 S.Ct. at 838. "The basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, (citations omitted) but to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms.' " *First Options*, ___ U.S. at ___, 115 S.Ct. at 1925. Prudential's assertion that the FAA's purpose is to limit litigation is clearly unsupported by the law and is inaccurate.

In addition, this Court's decision in *First Options* cuts to the heart of Prudential's claim that the "knowing agreement" standard is contrary to the FAA's purpose because it "promises to foster pre-arbitration collateral litigation."

In *First Options*, this Court held that a court, rather than an arbitrator, should decide the question of arbitrability unless there is "clear and unmistakable" evidence that the parties agreed to arbitrate the question of arbitrability. *Id.* at 1924. The presumption in favor of arbitration, which applies when determining what disputes the parties agreed to arbitrate, is reversed when the issue is whether the parties agreed to have the arbitrator decide issues of arbitrability. *Id.*

Neither the text of the FAA nor its underlying purpose precluded this Court from reaffirming a standard which includes the risk of pre-arbitration litigation. In fact, this Court dispelled any notion that the FAA's purpose is to resolve disputes as quickly as possible and rejected First Options argument that its holding would cause delay and waste in the resolution of disputes. *Id.* at 1925. Thus, the fact that a particular standard may require a court, rather than an arbitrator, to determine certain pre-arbitration issues does not create a conflict or inconsistency with the purposes of the FAA, as Prudential suggests.

Therefore, the Ninth Circuit's "knowing agreement" standard is entirely consistent with both the underlying purpose of the FAA and this Court's recent decisions in *Allied-Bruce Terminix* and *First Options*.

3. The Impact of the Ninth Circuit's Opinion Is Limited Because the NASD Amended Its Arbitration Provision To Specifically Include Employment Disputes

Based on wild hyperbole and gross speculation, Prudential argues that the potential impact of the Ninth Circuit's opinion is "enormous." Petition, pp. 28-29. Prudential baldly asserts that "the 'knowing agreement' standard will invite a party to resist arbitration, even when the applicable arbitration agreement expressly requires arbitration of statutory employment discrimination claims" and that few private agreements to arbitrate (not contained in a U-4 form) "contain language specifying statutory employment discrimination claims as covered." Petition, p. 29, fn. 16, 17. Such unsubstantiated and unfounded claims, as well as Prudential's exaggerated predictions of chaos and disaster, are not worthy of consideration by this Court.

In fact, the impact of the Ninth Circuit's opinion is quite limited given that the NASD amended its arbitration provision in October, 1993 specifically to include employment disputes. Section 8(a) of the NASD Code of Arbitration Procedure was amended to require arbitration of any dispute "arising out of the employment or termination of employment." *Kresock v. Bankers Trust Company*, 21 F.3d 176, 178. (7th Cir. 1994).[4] The NASD also amended Section 9 of its Code to provide that under certain circumstances employment disputes would be

---

[4] The October 1, 1993 amendments to the NASD Code of Arbitration are reproduced in the Appendix to this Opposition.

decided by a panel consisting of a majority of public arbitrators. *Id.*

The NASD effectively answered the underlying dispositive question of the proper interpretation of the pre-amendment NASD arbitration provision requiring arbitration of "business disputes." Accordingly, the Ninth Circuit's opinion will apply only to a limited number of cases which involve U-4 forms executed before October 1, 1993.

CONCLUSION

For the reasons stated, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit's Opinion in this case.

DATE: July 24, 1995

Respectfully Submitted,

BARBOZA & ASSOCIATES

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Attorneys for Respondents,
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CODE OF ARBITRATION PROCEDURE

Amendments to October 1, 1993 Edition

On October 1, 1993, Section 41.(f) was amended to make all arbitration awards, their contents, and the names of arbitrators publicly available. For public customer cases, this rule change will apply to awards rendered on or after May 10, 1989. For industry cases, including employment disputes, this rule change will apply to awards rendered on or after October 1, 1993.

Awards

Sec. 41.(f) All awards and their contents shall be made publicly available.

* * *

On October 1, 1993, Sections 1 and 8 were amended to clarify that employment-related disputes are arbitrable under the Code.

PART I. ADMINISTRATIVE PROVISIONS

Matters Eligible for Submission

Sec. 1. This Code of Arbitration Procedure is prescribed and adopted pursuant to Article VII. Section 1(a)(3) of the By-Laws of the National Association of Securities Dealers, Inc., (the Association) for the arbitration of any dispute, claim or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member,

with the exception of disputes involving the insurance business of any member which is also an insurance company:

(1) between or among members;

(2) between or among members and associated persons;

(3) between or among members or associated persons and public customers, or others; and

(4) between or among members, registered clearing agencies with which the Association has entered into an agreement to utilize the Association's arbitration facilities and procedures, and participants, pledgees or other persons using the facilities of a registered clearing agency, as these terms are defined under the rules of such a registered clearing agency.

* * *

PART II. INDUSTRY AND CLEARING CONTROVERSIES

Required Submission

Sec. 8. (a) Any dispute, claim or controversy eligible for submission under Part I of this Code between or among members and/or associated persons, and/or certain others, arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), or arising out of the employment or termination of employment of such associated person(s) by and with such member, shall be arbitrated under this Code, at the instance of:

(1) a member against another member;

(2) a member against a person associated with a member or a person associated with a member against a member; and,

(3) a person associated with a member against a person associated with a member.

* * *

On October 1, 1993, Section 9 was amended to provide that under certain circumstances employment disputes would be decided by a panel consisting of a majority of public arbitrators. This provision applies to cases where a panel has not yet been appointed as of October 1, 1993.

Composition of Panels

Sec. 9 (a) In disputes subject to arbitration that arise out of the employment or termination of employment of an associated person, and that relate exclusively to disputes involving employment contracts, promissory notes or receipt of commissions the panel of arbitrators shall be appointed as provided by Sections 9(b)(i), (b)(ii) or 10 of the Code, whichever is applicable. In all other disputes arising out of the employment or termination of employment of an associated person, the panel of arbitrators shall be appointed as provided by Sections 13 or 19 of the Code, whichever is applicable.

(b)(i) Except as otherwise provided in Section 9(a) or 10 of the Code, in all arbitration matters between or among members and/or persons associated with members, and where the amount in controversy does not exceed $30,000, the Director of Arbitration shall appoint a

single arbitrator to decide the matter in controversy. The arbitrator chosen shall be from the securities industry. Upon the request of a party in its initial filing or the arbitrator, the Director of Arbitration shall appoint a panel of three (3) arbitrators, all of whom shall be from the securities industry.

(ii) Except as otherwise provided in Section 9(a), in all arbitration matters between or among members and/or persons associated with members and where the amount in controversy exceeds $30,000, a panel shall consist of three arbitrators, all of whom shall be from the securities industry.

(3)

Supreme Court, U.S.
FILED
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No. 94-1923

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Petitioner,

—v.—

JUSTINE LAI and ELVIRA VIERNES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF *CERTIORARI*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1923

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Petitioner,

—v.—

JUSTINE LAI and ELVIRA VIERNES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF *CERTIORARI*

The Securities Industry Association, Inc., through its Compliance and Legal Division ("SIA"), submits this brief as *amicus curiae* in support of the Petitioner and urges this Court to issue a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit with respect to the opinion and judgment of the Ninth Circuit below in *Prudential Insurance Company of America* v. *Lai*, 42 F.3d 1299 (9th Cir. 1994). Pursuant to Rule 37.2 of the Rules of this Court, the written consent of all parties has been obtained and filed with the Clerk of this Court.

INTEREST OF *AMICUS CURIAE*

SIA is the principal trade association of the securities industry. It has as members more than seven hundred securities firms in the United States and Canada. As such, it has a substantial interest in the extent to which agreements to arbitrate disputes between securities firms and their employees may be enforced. Indeed, the rules and the registration applications of self-regulatory organizations in the securities industry, including the National Association of Securities Dealers, Inc. ("NASD"), require arbitration of employment disputes between securities firms and their employees. Because arbitration is an efficient, fair and economical manner of resolving disputes, SIA believes that employment disputes between securities firms and their employees should be arbitrated in most instances. Accordingly, this *amicus curiae* brief is one of several such briefs that SIA has submitted to this Court concerning arbitration issues in which SIA has urged the Court to continue in its enforcement of the strong federal policy favoring arbitration.[1]

This Court has previously held in *Gilmer* v. *Interstate Johnson Lane Corp.*, 500 U.S. 20 (1991), that in the presence of an agreement to arbitrate employment disputes, such disputes must be submitted to arbitration even where statutory employment claims are at issue. In light of the Ninth Circuit's decision below, which is contrary to the rulings of all other Circuits on these issues, mandatory arbitration of federal and state statutory employment discrimination claims is no longer certain. Nor, in light of the conflict in the Circuits, is it cer-

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[1] SIA also submitted *amicus curiae* briefs in the following cases: *First Options of Chicago, Inc.* v. *Kaplan*, 115 S. Ct. 1920 (1995); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212 (1995); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220 (1987); and *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985).

tain whether before proceeding to arbitration there must be a preliminary judicial finding that the parties "knowingly agreed" to arbitrate their statutory employment discrimination claims. In the face of these uncertainties, SIA and its member firms have a substantial interest in this Court's grant of *certiorari* in this case.

REASONS FOR GRANTING A WRIT OF *CERTIORARI*

SUMMARY OF ARGUMENT

The opinion of the United States Court of Appeals for the Ninth Circuit below reflects the suspicion courts once held of the arbitral process, *see Wilko* v. *Swan*, 346 U.S. 427 (1953), as opposed to the congressionally enacted federal policy recognizing arbitration as a fair and efficient means of resolving disputes. *See Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth*, 473 U.S. 614 (1985). Specifically, the court below declined to apply the correct standard to determine arbitrability, articulated by this Court in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Instead, based on purported inadequacies in the arbitration process, the court imposed an additional requirement to enforce the arbitration of a statutory claim, the finding of a so-called "knowing agreement" to arbitrate. Not only does the Ninth Circuit's decision conflict with this Court's holding in *Gilmer*, as well as decisions in other courts of appeals, it also represents potential confusion for the securities industry which, in following the decision below, is faced with the inability to enforce arbitration agreements according to their terms.

Under the Ninth Circuit's highly subjective "knowing agreement" standard, even enumerating each claim that is subject to arbitration would not necessarily ensure an enforceable arbitration agreement, nor would it obviate the need for a preliminary judicial finding regarding the employee's understanding as to the extent of the agreement to arbitrate. Such a result only hampers the efficiency that arbitration is designed

to provide and increases the judicial involvement that arbitration is intended to alleviate. *See Allied-Bruce Terminix Companies, Inc.* v. *Dobson*, 115 S. Ct. 834, 841 (1995). Furthermore, this existing conflict in the Circuits threatens the uniformity of the registration application (in which the arbitration agreement is contained), thereby defeating the goal of streamlining the paperwork required to register and regulate members of the securities industry.

SIA respectfully requests that the petition for *certiorari* be granted to resolve this conflict and further define the scope and validity of arbitrable rights within the securities industry.

POINT I

THE NINTH CIRCUIT'S DECISION IS A RADICAL DEPARTURE FROM WELL-SETTLED FEDERAL LAW AND POLICY FAVORING ARBITRATION

A. This Court Has Consistently Enforced Arbitration Agreements

This Court's mandate in recent decisions to compel the enforcement of arbitration agreements has been unambiguous, even when statutory rights are involved. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (employment discrimination claims); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (claims under the Securities Act of 1933); *Shearson/American Express, Inc.*, v. *McMahon*, 482 U.S. 220 (1987) (claims arising under the Racketeer Influenced and Corrupt Organizations Act and the Securities Exchange Act of 1934); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust claims). Indeed, this Court held, in a landmark decision, that an agreement to arbitrate an age discrimination claim under the Age Discrimination in Employment Act is enforceable under the Federal Arbitration Act ("FAA").

Gilmer, 500 U.S. 20. In *Gilmer*, the employee was required to sign the Uniform Application for Securities Industry Registration ("Form U-4"). By signing the Form U-4, the employee agreed, *inter alia*, to submit disputes arising between himself and his employer to arbitration, pursuant to the rules of the New York Stock Exchange, Inc. ("NYSE").[2] This Court reasoned that since the FAA manifests a liberal policy favoring arbitration, statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. *Gilmer*, 500 U.S. at 26 (*citing Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983) and *Mitsubishi*, *supra*).

The Ninth Circuit, however, has now undermined the law and policy favoring arbitration by requiring a preliminary judicial finding as to whether the securities professionals have "knowingly agreed" to arbitrate employment discrimination claims. This standard flies in the face of the reasoning of this Court in *Gilmer* which, like the instant case, involved an employment discrimination claim and an arbitration agreement contained in a Form U-4. This Court enforced the arbitration agreement in *Gilmer* without imposing the requirement of a preliminary finding that the parties "knowingly agreed" to arbitrate.[3]

In another recent decision on the enforceability of arbitration agreements, this Court reversed an Alabama Supreme

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[2] Specifically, the arbitration agreement contained in the Form U-4 provides:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register. . . .

[3] The Fifth Circuit Court of Appeals has expressly rejected the application of a "knowing waiver" standard in a case involving a registered representative who had signed a Form U-4. *Williams* v. *Cigna Financial Advisors, Inc.*, No. 94-11030, 1995 WL 366226 (5th Cir. June 19, 1995).

Court decision imposing a state statutory requirement that Alabama courts first inquire whether the parties "contemplated" that their arbitration agreement would involve "substantial interstate activity" before giving such agreements the force accorded by the FAA. *Allied-Bruce Terminix Companies, Inc.* v. *Dobson*, 115 S. Ct. 834 (1995). In so doing, this Court expressly declined to adopt an interpretation of § 2 of the FAA that would "invite[ ] litigation about what was, or was not, 'contemplated.' " *Id.* at 841. The rationale of *Allied-Bruce* requires a similar conclusion here.

B. The Requirement Of A Finding That The Parties "Knowingly Agreed" To Arbitrate Is Contrary To Basic Principles Of Contract Law.

The Ninth Circuit, in its holding below, reversed the judicial presumption in favor of arbitration when interpreting arbitration agreements involving statutory employment discrimination claims. Under the Ninth Circuit's decision, courts would be required to determine preliminarily whether the parties "knowingly agreed" to arbitrate such claims. To require such a finding is tantamount to disposing of one of the basic tenets of contract law: that a party is bound by the terms of the agreement that the party signs.

It is standard, hornbook law that one who signs a contract is presumed to have read and understood its contents, and will be bound to the terms of that contract regardless of whether she actually examined the document. *See* John D. Calamari & Joseph M. Perillo, The Law of Contracts § 9-42 (3d ed. 1987) ("party who signs an instrument . . . may not later complain . . . that he did not understand its contents").[4] In light of this

[4] Federal courts of appeals have consistently agreed. *See Heller Financial, Inc.* v. *Midwhey Power Co.*, 883 F.2d 1286, 1292 (7th Cir. 1989) ("basic contract law establishes a duty to read the contract; it is no defense to say, 'I did not read what I was signing' "); *Morta* v. *Korea Ins. Corp.*, 840 F.2d 1452, 1458 n.7 (9th Cir. 1988) (where plaintiff signed an unambiguous "release" clearly stating that he was waiving his right to

doctrine, the Ninth Circuit's notion of "knowingly agreed" is illusive.[5]

The fact that an agreement has been signed by the parties is, by itself, proof that the parties read and understood the terms of the document. Moreover, the Form U-4 is not a complex, lengthy document, filled with confusing legalese or hidden terms. On the contrary, the Form U-4 is written in simple and clear language. The terms of the various agreements and certifications contained therein are all set forth on one page, and each separate provision is numbered. The applicant for registration is instructed to "READ THE FOLLOWING VERY CAREFULLY". *See* Petition for Writ of *Certiorari* at App. 23, 24. In addition, a clear and concise instruction sheet accompanies each Form U-4 application.

Accordingly, absent legally sufficient excuses from performance, the arbitration agreement contained in the Form

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"all claims . . . foreseen and unforeseen", he could not escape the provision by claiming he had not read it); *Coleman* v. *Prudential Bache Securities, Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986) ("absent a showing of fraud or mental incompetence", customer was bound by arbitration agreement she signed); *Jakobson Shipyard, Inc.* v. *Aetna Casualty and Surety Co.*, 775 F. Supp. 606, 613 (S.D.N.Y. 1991), *aff'd*, 961 F.2d 387 (2d Cir. 1992) ("It is axiomatic that the signer of a contract is presumed to have read and understood all he signs").

[5] The Ninth Circuit did not dispute that parties *can* agree to arbitrate statutory claims. It held, however, that plaintiffs in this case, securities professionals, "could not have understood that in signing [the Form U-4], they were agreeing to arbitrate sexual discrimination suits." *Prudential Insurance Company of America* v. *Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994). The basis for this factual finding is a mystery. As stated by Judge Norris in his concurring opinion, "I am concerned . . . that the majority engages in appellate fact-finding by holding that these particular employees did not knowingly waive their trial rights, even though the district court never made a finding on the issue." *Id.* at 1306. For the Ninth Circuit to accept plaintiffs' purported ignorance of the scope of their arbitration agreement is to treat securities industry professionals with a paternalism usually reserved for individuals whose capacity to contract is in question.

U-4 should be enforced according to its terms. To graft on an additional requirement of "knowing agreement" denigrates the legal and practical rationale behind binding the parties who sign an agreement. Moreover, the Ninth Circuit's refusal to accept the parties' signatures as proof of having "knowingly agreed" when claims of statutory employment discrimination are involved, while accepting their assent as sufficient for all other claims, results in inconsistencies in enforcement of the arbitration provision, as well as other provisions of the Form U-4. Without further guidance from this Court, the securities industry (as well as other groups who regularly invoke arbitration) are left with uncertainty as to which statutory claims are arbitrable and what preliminary steps, if any, are necessary to enforce an arbitration agreement. As such, this Court should grant a writ of *certiorari*.

POINT II

THE NINTH CIRCUIT'S DECISION UNDERMINES IMPORTANT POLICY CONSIDERATIONS CONCERNING THE FORM U-4 WITHIN THE SECURITIES INDUSTRY

The Ninth Circuit's finding below that signing a U-4 does not constitute a "knowing agreement" to arbitrate statutory employment discrimination claims is inconsistent with the terms and purposes of the Form U-4. The Form U-4 is a personal registration form for individuals engaged in the securities business. The NASD, the NYSE, and other self-regulatory organizations cooperated in the development of Form U-4 in an effort to streamline the flow of information within the securities industry needed for regulatory purposes with respect to individual registered representatives. Adoption of Forms U-3 and U-4, Exchange Act Release No. 11,424, [1974-75 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,176, at 85,326 (May 16, 1975). Various provisions, including the one binding the registered person to arbitration, have been

permitted to be incorporated in the Form U-4 to decrease the number of required employment documents. *See* Adoption of Revised Form U-4, Exchange Act Release No. 17,388, 45 Fed. Reg. 84,992 (1980).

The rules of the NASD, the NYSE, and other self-regulatory organizations have included compulsory arbitration provisions since before the creation of Form U-4. Indeed, the rules of the NASD, the NYSE, and other self-regulatory organizations make it *mandatory* for a registered representative to arbitrate any employment-related dispute.[6] The version of Form U-4 signed by plaintiff-respondent Elvira Viernes provided:

> I . . . hereby certify that I have read, understand and agree to abide by, comply with, and adhere to all the provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules

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[6] Rule 347 of the NYSE, requiring the arbitration of "[a]ny controversy between a registered representative and any member . . . arising out of the employment or termination of employment of such registered representative", 2 NYSE Guide (CCH) ¶2347 (1995), has been in existence since 1958. *Association of Investment Brokers* v. *Securities and Exchange Commission*, 676 F.2d 857, 860 & n.8 (D.C. Cir. 1982). Part II, Section 8 of the NASD Code of Arbitration Procedure (the "NASD Code") was recently amended as a clarification of *existing* policy to provide that: "[a]ny dispute, claim or controversy eligible for submission under Part I of this Code between or among members and/or associated persons . . . arising in connection with the business of such member(s) or in connection with the activities of such associate person(s), *or arising out of the employment or termination of employment of such associated person(s) with such member*, shall be arbitrated under this Code, at the instance of . . . (2) a member against a person associated with a member". NASD Code Part II § 8, NASD Manual (CCH) ¶3708 (1995) (emphasis added). The italicized language above was added in an October 1, 1993 amendment to clarify that the arbitration of employment-related disputes is compulsory. *See Hall* v. *MetLife Resources*, [Current Binder] Fed. Sec. L. Rep. (CCH) ¶98,742, at 92,517 (S.D.N.Y. May 2, 1995) (holding that plaintiffs, by signing Form U-4, were bound to arbitrate their Title VII claims, even though forms were signed prior to 1993 amendment to NASD Code, as amendment was "merely a clarification of existing policy").

> and regulations of the states and organizations as they are and may be adopted, changed or amended . . . .[7]

Given that the rules of the NASD require arbitration of employment-related disputes, the Ninth Circuit's decision is inconsistent with the rules of the NASD that the employee agrees to abide by in the first instance.

The Form U-4 also requires that the securities firm certify that the employee is familiar with the "statute(s), constitution(s), rules and by-laws of the agency, jurisdiction, or self-regulatory organization. . . ." Inasmuch as mandatory arbitration of employment-related disputes is a part of the NASD rules, securities professionals are thus certified to be familiar with such provisions at the time of signing the Form U-4. The Ninth Circuit's decision ignores this critical fact and, indeed, undermines the regulatory desire to charge registered persons with knowledge of the rules of the various self-regulatory organizations through the Form U-4.

Additionally, the Ninth Circuit's decision effectively holds that an arbitration agreement is only enforceable where it specifically enumerates the statutory claims encompassed therein. Accordingly, to comply with the decision, a *new* Form U-4 would have to be created especially for use within the jurisdiction of the Ninth Circuit with a lengthy arbitration agreement listing every potential statutory claim covered by the agreement. This would create a new burden inconsistent with the regulatory desire to reduce paperwork in and streamline the securities registration process. Furthermore, given the subjectivity of the Ninth Circuit's standard of a "knowing

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[7] Similarly, plaintiff-respondent Justine Lai signed a later version of the Form U-4 agreeing to:

> abide by, comply with, and adhere to all the provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the states and organizations as they are and may be adopted, changed or amended from time to time . . . .

See Petition for Writ of *Certiorari* at App. 23, 24.

agreement", such an enumeration of arbitrable claims still would not provide certainty as to whether the employee agreed to arbitrate such claims.

The Ninth Circuit's decision reverses two decades of progress that has been made in the securities industry toward the development of an efficient system of registration, reporting and dispute resolution through the Form U-4 that does not impose undue burdens on securities firms who seek to comply with that system.

CONCLUSION

For the reasons set forth above, *amicus* Securities Industry Association, Inc. respectfully requests that the petition for a writ of certiorari be granted.

Dated: July 20, 1995

Respectfully submitted,

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In The

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THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Petitioner,

v.

JUSTINE LAI and ELVIRA VIERNES,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Petitioner respectfully submits this Reply Brief pursuant to Rule 15.6 to address arguments first raised in Respondents' brief in opposition. Specifically, Respondents argue that the disputed Ninth Circuit decision[1] 1) rests on two separate holdings (Brief in Opp., pp. 5-7), 2) is consistent with this Court's recent decision in *First Options of Chicago, Inc. v. Kaplan*, ___ U.S. ___, 115 S. Ct. 1920 (1995) (Brief in Opp., pp. 12-14), and 3) is of limited

[1] *The Prudential Insurance Company of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994).

impact because of an amendment to the National Association of Securities Dealers ("NASD") Code of Arbitration. (Brief in Opp., pp. 15-16).

I. The Ninth Circuit Panel Did Not Make Two Holdings

The Ninth Circuit's decision rests solely on a misinterpretation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. 42 U.S.C. § 2000e, *et seq.*, as amended. After noting Section 118 of that Act, citing to a portion of the legislative history of this uncodified section, and opining that significant differences exist in the remedies and procedural protections of arbitral and judicial forums, the Ninth Circuit panel concluded, 2-1, "that a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration." 42 F.3d at 1305.

Everything the Ninth Circuit thereafter wrote was derivative of its foregoing conclusion. From its faulty interpretation of the 1991 Act and selective reading of its legislative history, the panel majority concluded it had a license to interpret arbitration agreements different from other contracts.[2] Specifically, an arbitration agreement, at least as it related to statutory employment discrimination claims, would be valid only if the party now resisting

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[2] *See* discussion *infra* at pp. 3-5. The FAA prohibits such differential treatment. 9 U.S.C. § 2. *See also Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

arbitration "knowingly contract[ed] to forego . . . statutory remedies in favor of arbitration." 42 F.3d at 1305. The panel then found that the plaintiffs below, Respondents here, "could not have *understood* that in signing [the U-4 Form], they were agreeing to arbitrate sexual discrimination suits." 42 F.3d at 1305 (emphasis added).[3] The court so found because the U-4 form – mistakenly referred to as "the employment contract with Prudential that plaintiffs executed" – "did not describe any disputes the parties agreed to arbitrate." 42 F.3d at 1305.[4] Accordingly, in the panel majority's mind, the newly applicable subjective *knowing agreement* standard was not met.[5] Thus, the panel concluded, plaintiffs "were not bound by

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[3] For purposes of its analysis, the panel *assumed* that the plaintiffs "were aware of the nature of the U-4 form." 42 F.3d at 1305. Therefore, the panel, in addition to requiring a showing that the party "understood" the terms of an executed arbitration agreement, also required a showing that the party understood the "nature" of the agreement.

[4] The panel ignored the fact that this Court has endorsed arbitration agreements equally broad as the U-4 form language at issue here. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 624 n.13; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 223, 238 (1987); and *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 478-83 (1989).

[5] Of course, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and its ample progeny did not impose a "knowing agreement" standard and, consistent with the federal policy favoring arbitration, compelled arbitration of statutory employment discrimination claims. Under the facts and circumstances in those cases, however, the *Lai* panel would rule otherwise. There is, indisputably, a decisional conflict among the circuits in outcome.

any valid agreement to arbitrate" their statutory discrimination claims. 43 F.3d at 1305.[6]

The panel majority also opined, in pure dicta, that "even if appellants had signed a contract containing the NASD arbitration clause [to which the court presumably was referring to the NASD Code of Arbitration], it would not have put them on notice that they were bound to arbitrate Title VII claims." 42 F.3d at 1305. That dictum does not support Respondents' assertion that the panel actually made two separate holdings. The panel majority's decision rested solely on the fatal deficiencies it found in the one document executed by Respondents, *i.e.*, the U-4 form.

Moreover, the panel certainly would have applied its subjective *knowing agreement* standard to the Code of Arbitration language had it deemed that language relevant.[7] Petitioner has challenged the court's adoption of

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[6] The subjective "knowing agreement" standard is the by-product of the Congressional concern the panel majority erroneously discerned from the 1991 amendments to Title VII and a portion of its legislative history. Since the legislative history of Section 118 of the 1991 Civil Rights Act lacks any semblance of unison – that is, no "clearly expressed" legislative intent is evident – Section 118's textual expression of encouragement should be regarded as conclusive. *Reves v. Ernst & Young*, ___ U.S. ___, 113 S. Ct. 1163, 1169 (1993) (citing decisions). The panel majority erred, therefore, in giving determinative weight to the discordant legislative history of Section 118.

[7] The appellate court opined that the Code of Arbitration language "would not put [Respondents] *on notice* that they were bound to arbitrate Title VII claims." 42 F.3d at 1305 (emphasis added). This "on notice" requirement derives from the court's adoption of a special subjective knowing agreement standard

that standard and its rejection of the long-established presumption in favor of arbitrability. Accordingly, even if the panel majority made two holdings as Respondents contend, both holdings are subsumed in the first question presented to this Court by Petitioner.[8]

The panel majority's decision has created an unseemly hierarchy among the federal employment discrimination laws, since some forms of discrimination – that proscribed by the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 – will be associated with a *de novo* trial right, whereas other forms of employment discrimination – that proscribed by the Age Discrimination in Employment Act and the Civil Rights Act of 1866 – will be subject to binding pre-dispute arbitration agreements. Indeed, the panel majority's rationale even would distinguish between various forms of racial discrimination (Title VII versus the Civil Rights Act of 1866: § 1981 claims would have to be arbitrated, whereas Title VII claims would not have to be). With respect to state-law employment discrimination claims, this potential hazardous dichotomy among such claims will result within the text of a *single* state statute, *e.g.*, California's Fair Employment and Housing Act which proscribes age (presumptively arbitrable) as well as other forms of discrimination

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for application in post-1991 Civil Rights Act employment discrimination cases.

[8] Judge Norris in his concurring opinion takes issue with the panel majority's *holding*, in the singular, "that Congress intended that employees can only *knowingly* waive their right to adjudicate employment discrimination claims." 43 F.3d at 1306 (emphasis in original).

prohibited by Title VII (presumptively non-arbitrable). *See* Douglas E. Abrams, *Arbitrability in Recent Federal Civil Rights Legislation: The Need for Amendment*, 26 Conn. L. Rev. 521, 581-82 (1994).

II. The Ninth Circuit's Decision Is Inconsistent With This Court's Recent Decision In *First Options Of Chicago, Inc. v. Kaplan*

To the extent this Court's decision in *First Options of Chicago, Inc. v. Kaplan*, ___ U.S. ___, 115 S. Ct. 1920 (1995), is relevant to the instant Petition, it is not for the purposes cited by Respondents. There is no dispute here that a court, not an arbitrator, had the primary power to decide if the parties agreed to arbitrate the merits of their dispute. Thus, the answer to the "who" question regarding arbitrability – the focus of the Court's decision in *First Options* – is not at issue.

The *First Options* decision is instructive, nevertheless. As it had earlier in last year's term, the Court in *First Options* counselled lower courts that in deciding whether the parties agreed to arbitrate a certain matter, with exceptions not relevant here, they should apply ordinary state-law principles that govern the formation of contracts. ___ U.S. ___, 115 S. Ct. at 1924. *See also Mastrobuono v. Shearson Lehman Hutton, Inc.*, ___ U.S. ___, 115 S. Ct. 1212, 1219 (1995).

California law principles that govern the formation of contracts are well-established. Unless Section 118 of the Civil Rights Act of 1991 somehow trumped those principles, the panel majority's decision is inconsistent

with the teachings of this Court, as most recently pronounced in *Mastrobuono* and *First Options*, in that it did not apply those principles to the critical interpretation of the U-4 form language at issue.

Under California law, the intent of the parties determines the meaning of the contract. Cal. Civ. Code § 1636. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible," subject to statutory provisions not applicable here. Cal. Civ. Code § 1639. "The relevant intent is 'objective' – that is, the intent manifested in the agreement and by surrounding conduct – rather than the subjective beliefs of the parties. [citations omitted] For this reason, the true intent of a party is irrelevant if it is unexpressed." *United Commercial Insurance Service, Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 660 (1992).

Here, Respondents agreed to arbitrate "any dispute, claim, or controversy" that arose between them and Petitioner "arising in connection with the business" of Petitioner. App. 6-7, 18-19. Even ignoring the applicable presumption in favor of arbitration and the well-established rule that arbitration should be upheld unless it can be said with positive assurance that the arbitration clause is not susceptible to an interpretation covering the asserted dispute, the application and effect of the "any dispute, claim, or controversy" language is certainly broad enough to encompass the parties' underlying disputes. *See Vianna v. Doctors' Management Co.*, 27 Cal. App. 4th 1186, 1189-90, 33 Cal. Rptr. 2d 188, 189-90 (1994).

The Ninth Circuit's decision is inconsistent with the controlling state-law principles of contract interpretation and, thus, contrary to this Court's command in *First Options* and *Mastrobuono*.

III. The Impact Of The Ninth Circuit's Decision Will Not Be Limited As A Result Of Amendments To The NASD's Code Of Arbitration

Respondents suggest that the Ninth Circuit's decision will apply only to cases which involve U-4 forms executed before October 1, 1993. (Brief in Opp., pp. 15-16). Although it is obvious why Respondents make this suggestion, they point to nothing in the language of the decision to support the contention and, as shown below, lower courts already are following the panel's decision into error by failing to enforce arbitration agreements.

In fact, the decision, on its face, applies to all commercial arbitration agreements. In the absence of a showing that a plaintiff has knowingly agreed to submit statutory employment discrimination claims to arbitration, she will not be required to submit such claims to arbitration. The court found the arbitration agreement here (the U-4 form) fatally defective because it "did not purport to describe the types of disputes that were to be subject to arbitration." 42 F.3d at 1305. Presumably *any* arbitration agreement that was similarly "defective"

would be deemed invalid, at least for purposes of statutory employment discrimination claims.[9]

Moreover, district courts in the Ninth Circuit do not share Respondents' limited reading of the decision at issue here. For example, United States District Judge William H. Orrick felt obliged to disregard a Ninth Circuit order favoring arbitration because the *Lai* panel's decision represents an "intervening change in the law." *Hurst v. Prudential Securities, Inc.*, No. C-90-2930, 1995 WL 419742, at *6 (N.D. Cal. July 10, 1995). As a result, Judge Orrick concluded that he did not have to comply with the earlier unpublished order requiring arbitration of Hurst's claims, including a claim under Title VII. The earlier appellate panel had rejected Hurst's claim that she did not knowingly and voluntarily agree to arbitrate her Title VII claims and, instead, had disposed of the appeal by relying on this Court's decision in *Gilmer* and the Ninth Circuit's decision in *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992). *Hurst*, 1995 WL 419742, at *3. In effect, Judge Orrick views the decision at issue here to represent a change in the law from that represented by the *Gilmer* and *Mago* decisions.

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[9] The *Lai* decision has been cited by plaintiffs attempting to avoid judicially-compelled arbitration of statutory employment discrimination claims in situations that do not involve a U-4 form arbitration agreement. *See, e.g., Maye v. Smith Barney*, No. 95-C-1878, 1995 WL 493091, at *4 (S.D.N.Y. Aug. 17, 1995); *Gateson v. ASLK-Bank, N.V./CGER-Banque S.A.*, No. 94-C-5849, 1995 WL 387720, at *3 (S.D.N.Y. June 29, 1995); and *Williams v. Raley's Superstores, Inc.*, No. 94-C-3867, 1995 WL 20462, at *4 (N.D. Cal. Jan. 13, 1995).

CONCLUSION

Because of the uncertainty that inevitably attends judicial interpretation of legislative history, confusion about the effect of the legislative history of the 1991 Civil Rights Act (as well as the effect of the comparable legislative history of Section 118's analog in the ADA, Section 513) likely will persist pending this Court's pronouncement. Absent this critical judicial resolution, uncertainty, delay and expense which are inconsistent with arbitration's mission to provide swift, efficient dispute resolution will surely prevail. Accordingly, Petitioner respectfully requests that its Petition for Certiorari be granted.

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Respectfully submitted,

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